No. 83 36

Office-Supreme Court, U.S.
FILED
JUL 11 1983
ALEXANDER L. STEVAS,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS P. VANN and
JAMES E. MELHORN

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MURRAY S. MONROE
Counsel of Record

William J. Seitz
TAFT, STETTINIUS & HOLLISTER
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838
Attorneys for Petitioner Vann

ROBERT W. RITCHIE
Counsel of Record

John E. Eldridge
RITCHIE, CHADWELL & ELDRIDGE
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661
Attorneys for Petitioner Melhorn

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

1. May the Sixth Circuit disregard the confrontation clause as interpreted in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and as properly applied in *United States* v. *Gibbs*, 703 F.2d 683 (3rd Cir. 1983) so as to permit the Government to prove a substantial part of a conspiracy charge through the testimony of co-conspirators who were neither produced at trial nor shown to be unavailable for cross-examination?

2. In the face of the express prohibition in Federal Rule of Evidence 404(b) against the use of prior offenses to prove propensity to commit the offense charged, may an appellate court, in a *per se* Sherman Act bid rigging case under § 1 of the Sherman Act (15 U.S.C. § 1) sanction the admission of testimony as to six uncharged bid rigging occurrences which are ostensibly introduced to show that the defendants had the basic intent to agree to the charged offense under circumstances in which:

a) the district court expressly ruled that such evidence was *inadmissible* for that purpose as tending to prove only the propensity of the defendants to conspire:

b) basic intent to agree is necessarily inferable from proof of the charged act of conspiring;

c) the defendants did not genuinely dispute that they possessed that intent; and

d) the effect of the ruling is to make uncharged Sherman Act offenses admissible in all *per se* criminal antitrust cases?

3. May a district court, believing that the elevated intent standards of *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978) apply to a *per se* illegal antitrust offense, decide *sua sponte* that bad act evidence is admissible to show that elevated intent and then fail correctly to instruct the jury as to the elevated intent standards of *Gypsum*?

4. Does the Sixth Amendment right to consult with counsel terminate at the district court level and permit an appellate court to continue with an appeal when the accused has become incapacitated to the point that he can neither think nor communicate with counsel?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	V
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Proceedings in the District Court	2
II. Facts Pertinent to Confrontation Clause Issue	3
III. Facts Pertinent to Bad Acts Evidence Issues	4
IV. Preliminary Proceedings in the Sixth Circuit	6
A. The Denial of Petitioner Vann's Sixth Amendment Rights	6
B. The Denial of Petitioners' Motion to Supplement the Record or Strike Parts of the Government's Brief	7
V. The Sixth Circuit's Opinion on the Merits	7
A. Confrontation Clause Issue	8
B. Bad Acts Evidence Issues	8
REASONS FOR GRANTING THE WRIT	9
I. The Sixth Circuit's Willingness to Permit the Introduction of Co-Conspirator Statements to Prove Substantial Parts of the Charged Offense, Where the Declarants Are Neither Produced Nor Shown to be Unavailable, Squarely Conflicts With the Third Circuit's Position on This Issue and is in Complete Derogation of This Court's Decision in *Ohio* v. *Roberts*	9-10

Page

II. The Sixth Circuit's Analysis of F.R.E. 404(b) Conflicts With That Employed in Other Circuits, is Unprecedented in Several Respects, and Sanctions the Use of Prior Bad Acts to Show Propensity to Conspire 15

A. Introduction 15

B. The Sixth Circuit's Analysis Conflicts With That in Other Circuits 16

C. The Sixth Circuit's Novel and Unwarranted Extensions of F.R.E. 404(b) Raise Important Questions of Federal Law Concerning the Proper Interpretation of That Rule 19

1) There is No Precedent For Admitting Prior Bad Acts in a *Per Se* Criminal Sherman Act Case, and the Sixth Circuit's Ruling Makes Such Evidence Automatically Admissible 19

2) In Violation of Rule 404(b)'s Express Prohibition, the Sixth Circuit Sanctioned the Use of Prior Bad Acts to Prove That the Accused Acted in Conformity Therewith ... 20

3) Contrary to Settled Rules, the Sixth Circuit Failed to Defer to the Trial Court's Discretion in Concluding That the Evidence Was Admissible on a Ground Expressly Rejected by the District Court 23

D. This Court's Failure to Address Rule 404(b) Has Spawned Confusion and Conflict and it is Now Time to Delimit the Contours of the Rule .. 24

III. The Conflict Between the Jury Instructions Here and Those Mandated by This Court's *Gypsum* Opinion Requires Review, Where the District Court Erroneously Applied *Gypsum* to a *Per Se* Offense for Purposes of Admitting Bad Act Evi-

Page

dence and Then Failed Correctly to Instruct the Jury as to the *Mens Rea* Standards Prescribed by That Case 25

IV. The Sixth Amendment Right to the Effective Assistance of Counsel Requires That a Court of Appeals Stay Proceedings Before It Until the Appellant is Mentally Able to Consult With His Counsel 27

CONCLUSION 30

APPENDIX

Judgment and Opinion of the Sixth Circuit 1a

Order Denying Motion to Supplement the Record or to Strike Portions of Appellee's Brief 9a

Order Denying Petitioners' Request for Continuance .. 10a

Order Denying Government's Request for Publication of Opinion 11a

Order Denying Rehearing 12a

Orders Staying Issuance of the Mandate 13a, 37a

Excerpts From Voir Dire and Pre-Trial Motion Transcript 14a

Trial Transcript of Colloquy and Ruling on Confrontation Clause Issue 17a

Trial Transcript of Colloquy and Final Ruling on Admission of Uncharged Bad Acts 19a

Constitutional and Other Provisions Involved 36a

TABLE OF CASES AND OTHER AUTHORITIES

I. CASES

	Page
Amador Beltran v. *United States*, 302 F.2d 48 (1st Cir. 1962)	15
Avery v. *Alabama*, 308 U.S. 444 (1940)	28
Barber v. *Page*, 390 U.S. 719 (1968)	10
Bollenbach v. *United States*, 326 U.S. 607 (1946)	27
Brewer v. *Williams*, 430 U.S. 387 (1977)	28
Chandler v. *Fretag*, 348 U.S. 3 (1954)	28
Connecticut v. *Johnson*, 103 S.Ct. 969 (1983)	26, 27
Douglas v. *California*, 372 U.S. 353 (1963)	28, 30
Dusky v. *United States*, 362 U.S. 402 (1960)	29
Dutton v. *Evans*, 400 U.S. 74 (1970)	10, 12, 13
Faretta v. *California*, 422 U.S. 806 (1975)	27, 28
Geders v. *United States*, 425 U.S. 80 (1976)	28-29
Gideon v. *Wainright*, 372 U.S. 335 (1963)	28
Glasser v. *United States*, 315 U.S. 60 (1942)	28
Goodwin v. *Swenson*, 287 F.Supp. 166 (W.D. Mo. 1968)	29
Herring v. *New York*, 422 U.S. 853 (1975)	27, 28
Hoggatt v. *Page*, 432 F.2d 41 (10th Cir. 1970)	28
House v. *Mayo*, 324 U.S. 42 (1945)	28
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	28
Klein v. *Harris*, 667 F.2d 274 (2d Cir. 1981), *overruled on other grounds sub nom Daye* v. *Attorney General*, 696 F.2d 186 (2d Cir. 1982)	15
Lenza v. *Wyrick*, 665 F.2d 804 (8th Cir. 1981)	11
Michelson v. *United States*, 335 U.S. 469 (1948)	24

Page

Nash v. *United States*, 229 U.S. 373 (1913) 20

Ohio v. *Roberts*, 448 U.S. 56 (1980) 10-15

Powell v. *Alabama*, 287 U.S. 45 (1932) 28

Sandstrom v. *Montana*, 442 U.S. 510 (1979) 26

Steele v. *Taylor*, 684 F.2d 1193 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1501 (1983) 10-11, 11

United States v. *Allen*, 542 F.2d 630 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977) 29

United States v. *Azzarelli Const. Co., Inc.*, 612 F.2d 292 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980) .. 21, 26

United States v. *Baldarrama*, 566 F.2d 560 (5th Cir.), *cert. denied*, 439 U.S. 844 (1978) 23

United States v. *Barlow*, 693 F.2d 954 (6th Cir. 1982) ... 11

United States v. *Baskes*, 649 F.2d 471 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981) 23

United States v. *Benedetto*, 571 F.2d 1246 (2d Cir. 1978) 17

United States v. *Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970) 20

United States v. *Bohr*, 581 F.2d 1294 (8th Cir.), *cert. denied*, 439 U.S. 958 (1978) 23

United States v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979) .. 20, 21

United States v. *Bryant*, 545 F.2d 1035 (6th Cir. 1976) .. 29

United States v. *Buchanan*, 633 F.2d 423 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981) 18

United States v. *Bulman*, 667 F.2d 1374 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982) 18

United States v. *Burchinal*, 657 F.2d 985 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) 18

Page

United States v. *Burkhart*, 458 F.2d 201 (10th Cir. 1972) 24

United States v. *Cargo Service Stations, Inc.*, 657 F.2d 676 (5th Cir.), *reh. denied*, 664 F.2d 291 (1981), *cert. denied*, 455 U.S. 1017 (1982) 21

United States v. *Continental Group, Inc.*, 603 F.2d 444 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980) 21

United States v. *Conway*, 632 F.2d 641 (5th Cir. 1980) .. 29

United States v. *Engleman*, 648 F.2d 473 (8th Cir. 1981) 18

United States v. *Fielding*, 630 F.2d 1357 (9th Cir. 1980), *reh. denied and amended*, 645 F.2d 719 (9th Cir. 1981) 11

United States v. *Fierson*, 419 F.2d 1020 (7th Cir. 1969) .. 17

United States v. *Figueroa*, 618 F.2d 934 (2d Cir. 1980) 17, 19

United States v. *Fleishman*, 684 F.2d 1329 (9th Cir.), *cert. denied*, 103 S.Ct. 464 (1982) 10

United States v. *Foskey*, 636 F.2d 517 (D.C. Cir. 1980) .. 17

United States v. *Gibbs*, 703 F.2d 683 (3rd Cir. 1983) 10, 11, 12

United States v. *Gillen*, 599 F.2d 541 (3rd Cir.), *cert. denied*, 444 U.S. 866 (1979) 20, 21

United States v. *Gocke*, 507 F.2d 820 (8th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975) 23

United States v. *James*, 555 F.2d 992 (D.C. Cir. 1977) .. 17

United States v. *Johnson*, 697 F.2d 735 (6th Cir. 1983) 17, 23

United States v. *Kahan & Lessin Co.*, 695 F.2d 1122 (9th Cir. 1982) 20

United States v. *Koppers Co.*, 652 F.2d 290 (2d Cir.) *cert. denied*, 454 U.S. 1083 (1981) 21

United States v. *Manafzadeh*, 592 F.2d 81 (2d Cir. 1979) 17

United States v. *Miller*, 508 F.2d 444 (7th Cir. 1974) 17

Page

United States v. *Mohel*, 604 F.2d 748 (2d Cir. 1979) 17

United States v. *O'Connor*, 580 F.2d 38 (2d Cir. 1978) .. 17

United States v. *Pantone*, 609 F.2d 675 (3rd Cir. 1979) .. 23

United States v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), *on reh.*, 686 F.2d 356 (5th Cir. 1982) 11

United States v. *Perez*, 658 F.2d 654 (9th Cir. 1981) 11

United States v. *Phillips*, 599 F.2d 134 (6th Cir. 1979) .. 17

United States v. *Powell*, 587 F.2d 443 (9th Cir. 1978) *appeal after remand*, 632 F.2d 754 (1980) 17

United States v. *Price*, 617 F.2d 455 (7th Cir. 1980) 18

United States v. *Ring*, 513 F.2d 1001 (6th Cir. 1975) 9, 17, 19

United States v. *San Martin*, 505 F.2d 918 (5th Cir. 1974) 17

United States v. *Sherer*, 653 F.2d 334 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981) 18

United States v. *SIGMA*, 624 F.2d 461 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981) 21

United States v. *Silva*, 580 F.2d 144 (5th Cir. 1978), *appeal after remand*, 611 F.2d 78 (1980) 17

United States v. *Ulland*, 643 F.2d 537 (8th Cir. 1981) ... 18

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 6, 8, 9, 20-22, 25-27

United States v. *Vesaas*, 586 F.2d 101 (8th Cir. 1978) .. 29

United States v. *Webb*, 625 F.2d 709 (5th Cir. 1980) 17

United States v. *Weidman* 572 F.2d 1199 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978) 18, 23

White v. *Ragen*, 324 U.S. 760 (1945) 28

II. STATUTES

Page

U.S. Const. Amend VI (Confrontation Clause) 2, 3, 7, 8, 10-15

15 U.S.C. § 1 (Sherman Act) ..... *passim*

28 U.S.C. Federal Rules Evidence 404(b) (Other Crimes, Wrongs, or Acts) ..... 2, 5, 9, *passim* 15-25

28 U.S.C. Federal Rules of Evidence 801(d)(2)(E) (Co-Conspirator Admissions) 2, 3, 7, 8, 11, 12, 13

III. OTHER AUTHORITIES

Baxter (Asst. Atty. Gen., Antitrust Division), "Statement Before the House Subcommittee on Monopolies and Commercial Law", Department of Justice Press Release (May 10, 1983) 25

Department of Justice, "Brief for the United States in Opposition to Petition for a Writ of Certiorari in No. 78-1872", *reprinted in*, 13C B.N.A. Law Reprints, "Trade Regulation Cases Denied Certiorari, 1979-1980," pp. 63-64 (1979) 22

Favretto (Ass't. Att'y. Gen., Antitrust Division), "Criminal Antitrust Prosecutions—The *Gypsum* Opinion." (March 1980 address), reprinted in 5 C.C.H. Trade Regulation Reporter ¶ 50,412 22

Lafave & Scott, *Criminal Law*, § 61 (4th Repr. 1978) 18, 21, 22

2 Weinstein, *Evidence* § 404[08], [09] (1982) 16, 21, 24

22 Wright & Graham, *Federal Practice & Procedure* §§ 5239, 5242, 5249 (1978), (1982 Supp.) 16, 23, 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. ————

THOMAS P. VANN and
JAMES E. MELHORN

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Thomas P. Vann and James E. Melhorn respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 8, 1983.

OPINIONS BELOW

The District Court wrote no opinion on the issues submitted here. The Court of Appeals' opinion on the merits is unpublished, the Government's request for publication of same having been denied. The Court of Appeals' order denying Petitioners' request for a continuance until such time as Petitioner Vann could consult with counsel is also unpublished.

JURISDICTION

The Sixth Circuit's judgment was dated March 8, 1983. The order denying rehearing and rehearing *en banc* was dated May 13, 1983. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S. Constitution Amendment VI

15 U.S.C. § 1 ("Sherman Act § 1")

28 U.S.C. Federal Rule of Evidence 404(b) ("F.R.E. (404(b)")

28 U.S.C. Federal Rule of Evidence 801(d)(2)(E) ("F.R.E. 801(d)(2)(E)")

These provisions are set forth in pertinent part at App. 36a.

STATEMENT OF THE CASE

I. Proceedings In The District Court

In February, 1981, Petitioners Vann and Melhorn were indicted for violating Section 1 of the Sherman Act. The indictment charged that Petitioners, who were mid-level management figures in a highway construction company, had entered into an agreement to allocate to their employer Contract 8148, let by the State of Tennessee on May 18, 1979, and to allocate to a competitor, Interstate Paving Company ("Interstate"), Contract 8175, which was let in June, 1979 and relet in September, 1979.

Citing the need to hold the Government's "feet to the fire in terms of making the proof conform to the indictment", the District Court ordered the Government to provide an involuntary Bill of Particulars ("Bill"). The Bill specified that there were 23 co-conspirators, ten sub-agreements of the charged conspiracy, and 105 overt acts taken in furtherance of the conspiracy.

At the trial, the Government called only five of the 23 co-conspirators to testify. Petitioners called several defense witnesses, but did not themselves testify. Petitioners' defense was simply that they had not agreed to the conspiracy charged in the indictment. Petitioners conceded that they knew and met with various co-conspirators. However, Petitioners in-

sisted that the charged agreement had not been proved, pointing to, *inter alia*:

1. testimony from the Government's own star witnesses that indicated that there was no agreement since a number of preconditions had never been satisfied;

2. testimony that the submitted bids on Contract 8148 were *all below* the State's own job cost estimate, and from all appearances not rigged; and

3. testimony that at least one other contractor was told by an Interstate executive that Contract 8148 was *not* rigged.

The jury deliberated over a three day period. It twice indicated its inability to reach a verdict before it finally returned guilty verdicts.

II. Facts Pertinent To Confrontation Clause Issue

The Bill identified executives of Malone Brothers Construction Co. ("Malone") and Pendleton Construction Co. ("Pendleton") as co-conspirators. Of the ten sub-agreements specified in the Bill, four were with Malone and Pendleton.

At trial, over objection, the Government's witness, Fugate, was permitted to testify as to statements made by Malone and Pendleton. The statements were admitted for their truth under F.R.E. 801(d)(2)(E). No effort was made either to produce or to demonstrate the unavailability of either witness – a fact the District Court conceded. App. 19a. The Government made *no effort* to show that the challenged statements were only of peripheral importance or that there would be no utility to confrontation of those witnesses. The Court ruled that satisfaction of F.R.E. 801(d)(2)(E) automatically satisfied the strictures of the Confrontation Clause and invited Petitioners to "take this to the Supreme Court and let them bite the bullet between the federal rules of evidence and the confrontation clause." App. 18a.

The statements of unconfronted witnesses Malone and Pendleton constituted substantially all the proof as to 40% of the Government's case. The prosecutors relied on these statements to urge conviction of Petitioners. Pendleton's statements concerned the only occasion when either Peti-

tioner discussed Contract 8175 with any competitor other than Interstate Paving's personnel. The testimony of the only five co-conspirators to testify in person was thus augmented by the testimony of these two unconfronted co-conspirators.

III. Facts Pertinent To Bad Act Evidence Issues

Mid-way through the Government's case in chief, and with no prior notice in the Bill or otherwise, the Court allowed the Government to introduce evidence as to Petitioners' alleged involvement in *six* uncharged bid-riggings. This included the testimony of one surprise witness and also testimony by one Mr. Pope – an admitted perjurer. Pope testified that he participated with Petitioners in rigging another bid some years before, but the job he described did not exist, he could not recall the year, and his company was ineligible to bid the job. In a post-verdict juror interview, the juror pointed to this prior bad act testimony as one of the main factors resulting in the verdict.

The admission of the prior bad act testimony followed cross-examination of the Government's two star witnesses, Riddle and Fugate, which elicited that their discussions with Petitioners about rigging contracts 8148 and 8175 had been conditioned on contacting everyone on the bidders list (or at least the major perceived "threats" to the job).* They admitted that this was never done. They further admitted that Petitioners were either not present, or merely present, at various meetings and during various other contacts. Petitioners made clear to the Court that the cross-examination was simply to show that no agreement was made, regardless of what the several parties had hoped to accomplish. (E.g., App. 24a-26a)

Over objection, the District Court initially permitted the first two "bad act" witnesses to testify on the theory that the

---

* They also admitted that it was industry custom that one cannot have an agreement to allocate a job unless all the major proposalholders go along, because absent such concurrence, everyone bids "the hard way" (competitively). They admitted that the low bids on 8148 reflected "hard way" bidding.

other bid-riggings were admissible to show Petitioners' intent to agree to the charged offense. However, before the third "bad act" witness testified, the Court reconsidered. It decided that the bad act testimony was *inadmissible* on the issue of Petitioners' basic intent to agree. The Court's ruling was premised upon a reasoned application of F.R.E. 404(b) to the elements of a Sherman Act criminal case:

> If [bad act evidence is admitted] on the intent to agree, that gets to whether or not there is an agreement, and an agreement is the essence of a crime. That gets awful close to [the forbidden use of bad act evidence that] . . . commission of a prior offense is the equivalent of the commission of this offense or that the defendants acted in conformity with the previous conduct. App. 21a.

The District Court understood that the basic intent to agree would follow as a necessary inference from proof of the only act – agreement – proscribed by the Sherman Act. It therefore reasoned that it was both unnecessary to resort to prior acts and prejudicial to do so, because such would be a forbidden use of prior conduct to prove that the accused acted in conformity with that conduct. App. 21a-22a, 28a-29a.

The Government's reaction to the District Court's new position was to admit that it wanted to use the bad acts to prove that Petitioners "did in fact have that intent to agree *and did agree*" App. 27a, (emphasis added). Unpersuaded by the Government's admission, the District Court twice gave a cautionary instruction informing the jury that it must find that Petitioners intended to agree and did agree to the charged offense by evidence *other than* the bad act evidence. App. 19a-21a.

Nevertheless, the District Court permitted the third bad act witness to testify, and instructed the jury to consider all of the bad act evidence, on the issue of whether Petitioners acted with knowledge of the probable anticompetitive consequences of their conduct. App. 19a-21a, 29a-30a. The District Court's ruling flowed from its belief that even in *per se* antitrust offenses such as bid-rigging, a conviction must rest upon proof not only that the accused intended to agree to a *per*

se illegal offense, but also that the accused possessed an intent to effectuate the object of the conspiracy ("elevated intent").* The District Court, in short, believed that this Court's rulings in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 & n. 21 (1978), mandated that the Government prove, by evidence that Petitioners acted with knowledge of the probable anticompetitive consequences of their conduct, that Petitioners intended a restraint of trade. Both the Government and Petitioners disagreed with this conclusion, at least to the extent that "elevated intent" could be used as a basis to admit bad act evidence.

Having submitted the bad act evidence on the "elevated intent" issue as described in *Gypsum*, the District Court's final charge instructed the jury to find that "the element of intent is supplied by proof beyond a reasonable doubt that the defendant knew the probable anticompetitive effect of the agreement." That instruction, however, failed also to state that under *Gypsum*, 438 U.S. at 444 & n. 21, the jury must first find that anticompetitive effects resulted and that absent such a finding, the jury must find that the defendants acted with the conscious object of producing a restraint of trade.

IV. Preliminary Proceedings In The Sixth Circuit

A. The Denial Of Petitioner Vann's Sixth Amendent Rights

Just before the Government's Brief was received, on November 11, 1982 Petitioner Vann suffered a severe heart attack and complications resulting in severe brain injury. At all times since then he has been in the "prolonged vegetative state." Vann's counsel's request for a continuance of oral argument, supported by letters from Vann's neurosurgeon

---

* Petitioners herein use "elevated intent" to describe any level of intent beyond the basic intent to agree, *i.e.* as used here, the term includes both of the standards which this Court explicated in its *United States Gypsum* opinion as being alternate methods of satisfying the "intent to effectuate objective" requirement which applies in some Sherman Act criminal cases. *See* notes 1, 55, *infra*.

and clinical data, was denied on February 17, 1983 on the grounds that argument could proceed without consultation with the client because appellate counsel was also trial counsel. App. 10a. Mr. Vann thus had no opportunity to review the Government's Brief, to consult with counsel on the Reply Brief, to assist counsel in rebutting arguments first raised on appeal by the Government, or to assist counsel in preparation for oral argument.

B. The Denial Of Petitioners' Motion To Supplement The Record or Strike Parts Of The Government's Brief.

In its brief on appeal the Government argued for the first time that its failure to produce or demonstrate the unavailability of Messrs. Malone and Pendleton was excused because the evidence was extremely reliable, not crucial to the Government and not devastating to Defendants. This is to be contrasted with the Government's argument below that satisfaction of F.R.E. 801(d)(2)(E) automatically satisfies the Confrontation Clause and that a showing of unavailability was unnecessary. (App. 16a-17a) This "excuse" was never raised below, the record is barren on the issue, the District Court did not consider it, and Petitioners had no opportunity to meet it. Thus, in the Sixth Circuit Petitioners sought to show that any exception to the Government's Sixth Amendment duty to show the absent declarants' unavailability was inapplicable because grand jury transcripts provided to Petitioners (but not part of the trial record) demonstrated the potential utility of cross-examination. Alternatively, Petitioners asked the Court of Appeals not to consider this new argument and to strike those parts of the Government's Brief which raised it. The Sixth Circuit denied both branches of Petitioners' motion, by order dated Jan. 13, 1982 (App. 9a).

V. The Sixth Circuit's Opinion On The Merits

Sixth Circuit Judges Kennedy and Martin, and District Judge Harvey, affirmed the convictions in a not-for-publication order dated March 8, 1983. The Government's request that the order be published was denied by order dated March

24. Petitioners' timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on May 13, 1983.

A. Confrontation Clause Issue

In its opinion on the merits, the Sixth Circuit panel decided that it "need not intimate a view" on the Confrontation Clause implications of the admission of evidence under F.R.E. 801(d)(2)(E) when the declarant is not first shown to be unavailable. Without any explanation of its reasons, the Sixth Circuit simply held that

> whether applying the rule that evidence admitted under the federal co-conspirator exception automatically complies with the requirements of the confrontation clause, or the rule that the declarant must be unavailable, unless the evidence is neither crucial to the prosecutor nor devastating to the defendant, the testimony in dispute is admissible. App. 8a.

Sub silentio, the Sixth Circuit found without benefit of a record that the evidence was neither crucial nor devastating.

B. Bad Act Evidence Issues

On appeal, both sides agreed that the elevated intent standards articulated in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 & n. 21 (1978), did not apply to a *per se* antitrust case and that bad act evidence should not be admitted, as the District Court had done, to show such intent. Because of this concession by the parties, the Sixth Circuit never addressed the "elevated intent" issue, which was the basis upon which the evidence actually was submitted to the jury. Instead, the Sixth Circuit held that the evidence could have been admitted to "prove the basic 'intent to agree' element of a criminal antitrust offense",[1] which

[1] App. 6a. In *Gypsum*, 438 U.S. at 443 & n. 20, this Court fleetingly described the "basic intent to agree" element as the intent "which is necessary to establish the existence of the conspiracy", but went on to focus on whether some Sherman Act criminal cases also ought to require proof that the conspirators intended to effectuate the object of the conspiracy.

was the very basis *expressly rejected* by the District Court.

The panel recognized that bad act evidence is inadmissible under F.R.E. 404(b)'s "intent" exception where the requisite criminal "intent is inferable if the proscribed act is proven and defendant does not claim mistake or inadvertance". App. 6a, *quoting United States* v. *Ring*, 513 F.2d 1001, 1009 (6th Cir. 1975). However, the panel tersely concluded that the evidence was admissible to show basic intent to agree:

> During their trials, appellants argued that while they had attended some meetings at which the rigging of contracts 8148 and 8175 was discussed, they were 'merely present' and never agreed to participate in the conspiracy. By asserting this 'mere presence' or 'lack of agreement' defense, appellants put intent to agree in issue. App. 6a.

The panel failed to address the fact that the District Court had concluded that the bad act evidence was *inadmissible* to show basic intent to agree. Moreover, it relied on the District Court's *later-recanted* finding that the evidence was more probative than prejudicial on that score. The panel thus substituted its discretion for that entrusted to the District Court, which discretion the District Court had *ultimately* exercised by ruling that use of the evidence to show "intent to agree" was tantamount to proving one conspiracy by resort to evidence of prior conspiracies. In short, the District Court's ruling that the evidence was inadmissible to prove intent to agree was reversed, and the District Court's ruling that the evidence was admissible on the elevated intent standards set forth in *Gypsum* was not considered.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S WILLINGNESS TO PERMIT THE INTRODUCTION OF CO-CONSPIRATOR STATEMENTS TO PROVE SUBSTANTIAL PARTS OF THE CHARGED OFFENSE, WHERE THE DECLARANTS ARE NEITHER PRODUCED NOR SHOWN TO BE UNAVAILABLE, SQUARELY CONFLICTS WITH THE

THIRD CIRCUIT'S POSITION ON THIS ISSUE AND IS IN COMPLETE DEROGATION OF THIS COURT'S DECISION IN OHIO v. ROBERTS

This Court's most recent discussion[2] of the interface between the Federal Rules of Evidence and the Confrontation Clause identified two seminal restrictions placed by the Confrontation Clause on the use of out-of-court statements in criminal trials. While not purporting to resolve all of the facets of the interface, *Ohio* v. *Roberts*, 448 U.S. 56 (1980) mandated that the analysis must follow from a two-step approach in which the prosecution must show that the evidence is both "necessary" and "reliable."[3] *Roberts* stated that in order to satisfy the necessity requirement, the prosecution must "either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[4] A footnote in *Roberts* referred to the Court's prior, plurality decision in *Dutton* v. *Evans*, 400 U.S. 74 (1970). In this note, *Roberts* suggested that a "demonstration of unavailability is not always required" under circumstances where "the utility of trial confrontation" is as "remote" as it was in *Dutton*.[5] At trial here, however, the Government failed to do anything whatsoever either in satisfaction[6] or excuse of the *Roberts* necessity requirement.

In *Roberts'* aftermath, decisions in four circuits have properly employed its two-track analysis to test against the Confrontation Clause the admission of co-conspirator statements.[7]

---

[2] *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

[3] 448 U.S. at 65.

[4] *Id.*

[5] *Id.* at n. 7.

[6] Under principles established in *Barber* v. *Page*, 390 U.S. 719, 725 (1968) and reaffirmed in *Roberts*, 448 U.S. at 74, the prosecutor's duty to show a declarant's unavailability is discharged only when an unsuccessful "good faith effort is made to obtain his presence at trial." The Government has never contested that it made no effort at all to bring Pendleton or Malone to the trial.

[7] *United States* v. *Gibbs*, 703 F.2d 683, 690-692 (3rd Cir. 1983); *United States* v. *Fleishman*, 684 F.2d 1329, 1338-1339 (9th Cir.), *cert. denied*, 103 S.Ct. 464 (1982); *Steele* v. *Taylor*, 684 F.2d 1193,

These cases recognized that evidence admissible under F.R.E. 801(d)(2)(E) does *not* automatically guarantee compliance with the Confrontation Clause.[8] Because the Sixth Circuit's decision here rested in part upon the view that "evidence admitted under the federal co-conspirator exception automatically complies with the requirements of the Confrontation Clause" (App. 8a), certiorari should be granted to inter this reasoning which conflicts with that of the Third, Fifth, and Ninth Circuits, (and with another decision in the Sixth), and which reduces *Ohio* v. *Roberts* to a nullity in criminal conspiracy cases.

While virtually all[9] of the appellate court decisions applying *Ohio* v. *Roberts* to analyze challenges to co-conspirator testimony have dealt only with contentions that the "reliability" prong of *Roberts* was not satisfied,[10] the precise

---

1200-1201 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1501 (1983); *United States* v. *Perez*, 658 F.2d 654, 660-661 (9th Cir. 1981); *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981); *United States* v. *Fielding*, 630 F.2d 1357, 1366-1367 (9th Cir. 1980), *reh. denied and amended*, 645 F.2d 719 (9th Cir. 1981). *Cf.*, *United States* v. *Barlow*, 693 F.2d 954, 964 & n. 10 (6th Cir. 1982); *Lenza* v. *Wyrick*, 665 F.2d 804, 811 (8th Cir. 1981).

[8] *E.g.*, *United States* v. *Gibbs*, 703 F.2d at 691: "We therefore believe that the Confrontation Clause and the evidentiary question must be separately analyzed, and that the Sixth Amendment may require the exclusion of evidence even though admissible under Fed. R. Evid. 801(d)(2)(E)."

[9] *But see*, *Steele* v. *Taylor*, 684 F.2d 1193 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1501 (1983). In *Steele*, a different Sixth Circuit panel concluded that because the *accused* was "at fault" for the absent declarant's unavailability, the admission of the co-conspirator statements did not infringe confrontation clause rights as embodied in the "necessity" prong of *Roberts*. However, *Steele* expressly observed that "it is questionable whether [declarant's] statement is admissible under the Confrontation Clause in the absence of a finding that the defendant's wrongfully caused the witness's unavailability." *Id.* at 1203. Significantly, the panel that decided this case did not so much as cite either *Roberts* or *Steele*, despite Petitioners' having urged the direct applicability of both cases.

[10] Petitioners here *do not* argue that evidence admissible under F.R.E. 801(d)(2)(E) necessarily runs afoul of the *Roberts* "reliability"

issue involved in this case was addressed by the Third Circuit in *United States* v. *Gibbs*, 703 F.2d 683 (3d Cir. 1983) just after the Sixth Circuit's decision here. As here, *Gibbs* involved a challenge to the admission of co-conspirator testimony based upon the "necessity" prong of *Roberts*. The Third Circuit squarely held that:

> where the Government has not demonstrated that the declarant is unavailable, and where the out-of-court statements are not sufficiently reliable and peripheral to justify dispensing with the unavailability requirement, the statements may not be admitted into evidence. 703 F.2d at 694.

Judge Rosenn and Chief Judge Seitz recognized in *Gibbs* that although there was "other evidence linking Gibbs to the conspiracy", the challenged statements provided "direct incriminating evidence". In any event the statements were more significant than the single sentence reported by one of twenty witnesses, the admission of which without any showing of the declarant's unavailability had been countenanced in *Dutton*. *Id.* More importantly, ruled the Third Circuit, the Government "has not 'met *its burden* to show that [the denial] . . . is such an exceptional situation" to warrant dispensing with confrontation. *Id.* (emphasis added).

Compelling reasons exist to review the Sixth Circuit's facile forgiveness of the Government's failure to show why the absent witnesses here were unavailable. First, despite *Roberts'* clear mandate, there is still a clear conflict between the courts, particularly between the Third and Sixth Circuits, as to the interrelationship of the Confrontation Clause and F.R.E. 801(d)(2)(E) and as to the need for an unavailability showing. The need for resolution of this conflict and for clear directions to trial courts was best expressed by the District Court's invitation here "to take this to the Supreme

---

requirement. Petitioners do contend that merely because a statement falls within a well-rooted hearsay exception does not dispense with the prosecutor's duty to show why an absent declarant is unavailable, as per the "necessity" prong of *Roberts*.

Court and let them bite the bullet between the federal rules of evidence and the Confrontation Clause." App. 18a.

Second, despite *Roberts'* mandate that the prosecution produce or demonstrate the unavailability of the declarant, federal prosecutors are consciously continuing to adhere to the view that satisfaction of Rule 801(d)(2)(E) alone dispenses with any need to meet this requirement.[11] In conspiracy cases, this tactic affords the prosecutor the luxury of calling only a few trained witnesses, from whose mouths are elicited, as co-conspirator testimony against the accused, the testimony of a host of absent witnesses concerning significant links in the chain of the charged conspiracy. Certiorari should be granted to foreclose a continuing prosecutorial abuse of Sixth Amendment rights.

Third, a writ of certiorari should issue to resolve confusion over the scope of any exception to the general duty to show why an absent declarant is unavailable. Courts are relying on a misreading of the exception set forth in the *Roberts* footnote to swallow the *Roberts* rule. In emphasizing that the *Dutton* exception was carved out only because the plurality Court found "the utility of trial confrontation" to be "so remote",[12] this Court in *Roberts* obviously was emphasizing that *Dutton* involved a very unique factual matrix. Facts adduced *at trial* in *Dutton* showed that the extrajudicial statements were only "of peripheral significance", the declarant's knowledge of the identity and role of the conspirators was "abundantly established", it was "inconceivable" that declarant could be shown not to have known if defendant was involved, and it was "wholly unreal" that cross-examination would have had any utility.[13] However, the Sixth Circuit here viewed the *Dutton* exception far more broadly by holding that it is necessary to show why the declarant is unavailable only when the evidence

---

[11] The prosecutors here and in *Gibbs* maintained that "a showing of unavailability is not required." *Gibbs*, 703 F.2d at 692; App. 16a-17a.

[12] *Roberts*, 448 U.S. at 65, n. 7.

[13] *Dutton*, 400 U.S. at 87-89. The Third Circuit in *Gibbs*, 703 F.2d at 693-694, properly recognized how narrow the *Dutton* exception is in *Roberts'* aftermath.

is crucial to the prosecution or devastating to the defendant. App. 8a. Thus having elevated the *Roberts* exception above the *Roberts* rule, the Sixth Circuit decided, *sub silentio*, that the Government can prove *four of its own ten* specifications of a charged conspiracy without demonstrating why the absent witnesses so testifying were unavailable for confrontation. The Sixth Circuit's obviously low thresholds of "cruciality" and high thresholds of "devastation" make a mockery of *Roberts*.

Fourth, certiorari should issue to clearly explicate that the Government bears the burden *at trial* either of:

1. producing the witness or demonstrating his unavailability, or

2. making a showing satisfactory to the trial judge that the utility of trial confrontation is so remote, and the subject of the extrajudicial statement so peripheral, that no showing of unavailability is required.

If an exception to the *Roberts* rule is warranted, its applicability first should be decided by the trial court on reasons then supplied by the prosecution. *Gibbs* correctly recognized that because confrontation "may only be denied in exceptional situations," it is the Government's "burden to show that the instant case is such an exceptional situation."[14] Here, the Sixth Circuit *itself* determined that the showing of unavailability was excusable. But the District Court did not consider that question, and the Government did not raise it until the appeal. Petitioners were foreclosed by the Sixth Circuit either from limiting the Government's Brief to the issue of whether an unavailability showing is ever required or from supplementing the record with grand jury transcripts which established a genuine factual issue as to the potential utility of trial confrontation.[15] Thus, certiorari should issue to establish the pro-

---

[14] 703 F.2d at 694 ("The prosecution has failed to establish . . . that the hearsay is sufficiently reliable and insignificant to justify dispensing with a showing of unavailability.").

[15] It is error for a court of appeals to uphold the admission of evidence on a basis different from that argued to the trial court when the trial court's ruling foreclosed an opportunity to make the factual findings needed to pass on the contention raised as alternate grounds

cedural requisites, the burden of proof, and the scope of a court of appeals' review power, where an exception to the unavailability showing rule is invoked as an excuse for denying confrontation.

These questions permeate criminal conspiracy trials and involve paramount Constitutional rights. It is now time to halt the Constitutional abuse that is engendered by the circuits' uneven application and evasive treatment of *Ohio* v. *Roberts*, and by the Government's unstemmed refusal to follow the two-track Confrontation Clause analysis employed therein. Petitioners therefore have accepted the District Court's plea to take this issue to this Court.

II. THE SIXTH CIRCUIT'S ANALYSIS OF F.R.E. 404(b) CONFLICTS WITH THAT EMPLOYED IN OTHER CIRCUITS, IS UNPRECEDENTED IN SEVERAL RESPECTS, AND SANCTIONS THE USE OF PRIOR BAD ACTS TO SHOW PROPENSITY TO CONSPIRE

A. Introduction

For the first time, a Court of Appeals has sanctioned the wholesale introduction of devastating testimony as to prior crimes in a *per se* Sherman Act case merely because the defendants denied the existence of the agreement charged in the indictment and made a peripheral reference to the fact that they were merely present when alleged conspiratorial discussions took place. In doing so, the Court of Appeals took a path which even the District Court rejected as being much too prejudicial to Petitioners since the evidence effectively proved only their propensity to commit Sherman Act crimes.

The reasons why a writ should issue to review the Sixth Circuit's decision are amplified below.

---

for admissibility on appeal. This is especially the case where constitutional error is involved. *Klein* v. *Harris*, 667 F.2d 274, 290-291 (2d Cir. 1981) *overruled on other grds. sub nom Daye* v. *Attorney General*, 696 F.2d 186 (2d Cir. 1982); *Amador Beltran* v. *United States*, 302 F.2d 48, 52 (1st Cir. 1962).

B. The Sixth Circuit's Analysis Conflicts With That In Other Circuits

"Intent" is the most frequently invoked exception to Rule 404(b)'s prohibition on the use of prior bad acts. Despite the number of cases, there is hopeless conflict among (and within) the circuits over the proper mode of analyzing whether the exception applies:

> Intent is generally an element of any crime with which the defendant has been charged. The courts differ on whether this entitles the prosecution to prove intent — and use other crime evidence to do so — regardless of the crime, the defense asserted, or the other evidence available.[16]

The principal area of conflict is whether intent must only be *an* issue, or whether the defense first must place intent *in* issue, and if the latter, under what circumstances will the defense be deemed to have done so.[17]

The better view is that, because intent is at least a nominal element of every crime, prior bad acts cannot be admitted under Rule 404(b) until the defense genuinely contests whether he possessed the requisite intent. The courts so holding make clear that this means more than pleading not guilty or contending that the accused did not do the "act" which is alleged to be criminal, if done with the requisite intent. Thus, several courts have observed that prior bad acts are inadmissible where the offense is one where the requisite

---

[16] 2 Weinstein, *Evidence*, ¶ 404[09] at 404-52 (1982).

[17] "Recognizing that the routine use of this exception could easily destroy the exclusionary rule, some courts have imposed additional requirements for its use. The most common of those rules demands that intent be a material issue in the case. This means more than that intent must be an element of the crime charged . . . The issue of intent must be seriously disputed . . . [However, the cases] . . . do not spell out how the trial court is to determine when intent is being seriously disputed . . . [and the] rule requiring intent to be disputed is not always followed and some opinions have flatly rejected it." 22 Wright & Graham, *Federal Practice & Procedure*, § 5242 at 488-490 (1978).

criminal intent would normally be inferable from proof of the proscribed act, and where the defense does *not* defend on the basis that, though he committed the act, he lacked the requisite intent. Under this view, the accused takes intent out of the case either by stipulation or by an express disavowal of an intent-based defense.[18] This is clearly the position of the Second[19] and District of Columbia Circuits[20], and until this case it was the position of the Sixth.[21] Decisions from the Fifth,[22] Seventh,[23] and Ninth[24] Circuits have also embraced this rationale, although other decisions in those circuits take a contrary view.

The other view is simply that if intent is *an* element of the crime charged, the prosecutor can delve into prior acts in his case in chief, regardless of whether the accused genuinely disputes intent, on the theory that the not guilty plea or a defense which only denies commission of the "act" part of the crime is sufficient. This doctrine, which effectively makes the admission of prior bad acts automatic, is the view of the

---

[18] *See, e.g., United States* v. *Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980); *United States* v. *Ring*, 513 F.2d 1001, 1008-1009 (6th Cir. 1975).

[19] *United States* v. *Figueroa*, 618 F.2d 934, 938-939 (2d Cir. 1980); *United States* v. *Mohel*, 604 F.2d 748 (2d Cir. 1979); *United States* v. *Manafzadeh*, 592 F.2d 81, 86 (2d Cir. 1979); *United States* v. *O'Connor*, 580 F.2d 38, 40-43 (2d Cir. 1978); *United States* v. *Benedetto*, 571 F.2d 1246, 1248-1249 (2d Cir. 1978).

[20] *United States* v. *Foskey*, 636 F.2d 517, 523-524 & n. 7 (D.C. Cir. 1980); *United States* v. *James* 555 F.2d 992, 999-1000 & n. 46 (D.C. Cir. 1977).

[21] *United States* v. *Johnson*, 697 F.2d 735, 738-739 (6th Cir. 1983); *United States* v. *Phillips*, 599 F.2d 134, 136-137 (6th Cir. 1979); *United States* v. *Ring*, 513 F.2d 1001, 1008-1009 (6th Cir. 1975).

[22] *United States* v. *Silva*, 580 F.2d 144, 148 (5th Cir. 1978), *appeal after remand*, 611 F.2d 78 (1980); *United States* v. *San Martin*, 505 F.2d 918, 921-922 (5th Cir. 1974). *Cf. United States* v. *Webb*, 625 F.2d 709, 710 (5th Cir. 1980).

[23] *United States* v. *Miller*, 508 F.2d 444, 448-450 (7th Cir. 1974); *United States* v. *Fierson*, 419 F.2d 1020, 1022-1023 (7th Cir. 1969).

[24] *United States* v. *Powell*, 587 F.2d 443, 448 (9th Cir. 1978), *appeal after remand*, 632 F.2d 754 (1980).

Eighth Circuit,[25] and seems also to be the current view of the Fifth,[26] Seventh,[27] and Eleventh[28] Circuits.

That this conflict has extensive practical consequences is best exemplified by this case. The Sixth Circuit did not quarrel with the fact that Petitioners *never* defended on the basis that they had agreed to rig the bids but did so innocently. Nor did the Sixth Circuit quarrel with the fact that Petitioners' counsel repeatedly and expressly disavowed an intent-based defense. In conspiracy cases, the 'act' part of the crime is the agreement[29] and the Sixth Circuit recognized that the defense was a "lack of agreement defense." Under the rule that a denial of the 'act' part of the crime raises no issue of intent, the prior act evidence would have been inadmissible. However, the Sixth Circuit's holding, premised as it was on the conclusion that denying the agreement placed intent in issue, resulted in the admission of the evidence simply because the defense put on a defense at all. This was especially egregious because, as shown below at C(2), proof of the 'act' part of the antitrust crime – the agreement – would of necessity prove that the parties had the basic intent to agree. Alternatively, the Sixth Circuit found that because Petitioners raised a 'mere presence' defense, the prior act evidence was admissible. While Petitioners disagree that this was a ma-

---

[25] *United States* v. *Burchinal*, 657 F.2d 985, 993 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *United States* v. *Sherer*, 653 F.2d 334, 338-339 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981); *United States* v. *Engleman*, 648 F.2d 473, 478-479 (8th Cir. 1981); *United States* v. *Ulland*, 643 F.2d 537, 541 (8th Cir. 1981).

[26] *United States* v. *Buchanan*, 633 F.2d 423, 426 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

[27] *United States* v. *Price*, 617 F.2d 455, 459-460 (7th Cir. 1980); *United States* v. *Weidman*, 572 F.2d 1199, 1201-1202 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978).

[28] *United States* v. *Bulman*, 667 F.2d 1374, 1382 (11th Cir. 1982), *cert. denied*, 456 U.S. 1010 (1982).

[29] *See* LaFave & Scott, *Criminal Law* § 61 at 460 (4th Repr. 1978) ("Conspiracy is not an exception" to the "general rule" that "an essential element of every crime is an act" because "the agreement itself is the requisite act").

terial part of the defense, the fact is that a claim that one was merely present or silently present is wholly consistent with a denial of the act of agreement; it merely negatives that the accused made any manifestation of having agreed, and such a claim is at best neutral as to whether the accused possessed the unmanifested requisite intent.[30] Thus, by allowing the prior act evidence to show intent because the accused claimed 'mere presence' – over an express disavowal that such claim was meant to raise an issue about intent – the Sixth Circuit held that a mere denial of the act is enough. This result could not have obtained under the cases previously cited.[31]

Because of this conflict, and because Rule 404(b) itself provides no guidance as to its resolution, this Court now should decide that prior bad acts are inadmissible to show intent where the accused simply denies the act part of the crime and disavows an intent-based defense, especially where the requisite intent follows as a necessary inference from proof of the proscribed act.

C. The Sixth Circuit's Novel and Unwarranted Extensions of F.R.E. 404(b) Raise Important Questions Of Federal Law Concerning The Proper Interpretation Of That Rule

1) There Is No Precedent For Admitting Prior Bad Acts In A Per Se Criminal Sherman Act Case, And The Sixth Circuit's Ruling Makes Such Evidence Automatically Admissible

In no prior case has any court permitted prior bad acts to be used to show intent in a *per se* criminal antitrust case. Neither the Government nor the courts below ever cited any

---

[30] It is hornbook law, and the jury here was instructed, that the mere presence of the accused with other alleged conspirators is not evidence of the conspiratorial agreement. Therefore, to the extent 'mere presence' was claimed, such did not rise to the level of a concession of the act of conspiracy, and a denial of the requisite intent.

[31] *See supra* notes 19 & 21 and especially, *United States* v. *Figueroa*, 618 F.2d at 941; *United States* v. *Ring*, 513 F.2d at 1007-1009.

such precedent. The few cases to consider the issue have disapproved of reference to uncharged offenses in this type of case, either because of its potential for prejudice[32] or because intent to effectuate the object of the conspiracy is not an issue in such cases.[33] In Sherman Act § 1 cases, "the criminal act is the agreement."[34] "No agreement" is the only defense to such a charge; it is made by the not guilty plea. The Sixth Circuit's ruling makes the admission of such evidence automatic in criminal Sherman Act cases, is unprecedented, and conflicts with the cases to address the issue. Any such sweeping extension of the law deserves review by this Court.

2. In Violation of Rule 404(b)'s Express Prohibition, The Sixth Circuit Sanctioned The Use of Prior Bad Acts To Prove That The Accused Acted In Conformity Therewith

This case presents the important federal question whether F.R.E. 404(b)'s express prohibition against use of prior bad acts to show that the accused acted in conformity can be avoided in a *per se* Sherman Act criminal case simply by admitting such evidence under the guise of "intent to agree", described by this Court in its *Gypsum* opinion as that "which is necessary to establish the existence of the conspiracy."[35] Because the Sixth Circuit failed to realize that "basic intent to agree" is inseparable from the proscribed act of conspiracy, it effectively permitted the government to prove that Petitioners rigged Contracts 8148 and 8175 because they had

---

[32] *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982); *United States* v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1108-1109 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979).

[33] *United States* v. *Bensinger Co.*, 430 F.2d 584, 594 & n. 4 (8th Cir. 1970). *See* notes 38 - 40, *infra*.

[34] *United States* v. *Gillen*, 599 F.2d 541, 545 (3rd Cir.), *cert. denied*, 444 U.S. 866 (1979). *Accord*, *Nash* v. *United States*, 229 U.S. 373, 378 (1913).

[35] *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443, n. 20 (1978).

allegedly rigged other contracts. This sort of reasoning has infected other conspiracy cases involving bad act evidence issues:

> But other crimes, wrongs, or acts extraneous to the conspiracy are sometimes admitted as relevant to the existence of a conspiracy with virtually no analysis by the court of why the defendant's participation in conspiracies amounts to anything more than proof of his propensity to engage in crime.[36]

It is now time to inter this misapplication of Rule 404(b).

The *per se* Sherman Act offense is *sui generis* because, unlike all other conspiracy offenses, there need be no proof of intent to achieve objective, a.k.a. specific or elevated intent.[37] Even after this Court's *Gypsum* decision, the courts have uniformly held that in *per se* criminal antitrust offenses, *"no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy"*[38]; no issue exists of intent to effectuate the object of the conspiracy[39]; and proof of the act of agreement makes it "impossible to infer lack of the requisite intent."[40] Similarly, the Government's steadfast position is that "specific intent need not be proved in Sherman Act cases", and that proof of an agreement of the

---

[36] 2 *Weinstein, supra*, note 16, ¶ 404[09] at 404-54.

[37] La Fave & Scott, *Criminal Law* § 61 at 464 (1972).

[38] *United States* v. *Gillen*, 599 F.2d 541, 545 (3rd Cir.), *cert. denied*, 444 U.S. 866 (1979) (emphasis added).

[39] *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 682-683 (5th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 293-296 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *SIGMA*, 624 F.2d 461, 465 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-462 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States* v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979).

[40] *United States* v. *Azzarelli Const. Co.*, 612 F.2d 292, 297-298 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980).

per se illegal class carries "its necessary inference of criminal intent."[41]

Thus, the basic intent to agree is all that need be proved in *per se* cases. Because this type of intent goes to establish "the existence of the conspiracy",[42] it is simply part of the prosecutor's burden to prove the 'act' part of the crime — the agreement itself.[43] As both the trial judge here (App. 21a-22a, 28a-29a) and leading commentators have observed,

> Every conspiracy involves an agreement, so it must be established that the several parties intended to agree. But such an intent is 'without moral content' . . . *The intent to agree is so intimately tied up with the agreement (the act part of the crime) that it is best dealt with in that context. Indeed, it may even be said that such intent is not really part of the mens rea of the conspiracy.*[44]

Because intent to agree is best dealt with in the context of the act part of the crime, and because it is not really part of the *mens rea* of the conspiracy, to use prior bad acts to show 'intent to agree' is simply a euphemism for proving one crime by proving other crimes. Not only does this violate the express prohibition of Rule 404(b), it also has the vicious consequence of allowing the prosecutor to bootstrap a weak case on the fact of anticompetitive agreement with resort to extraneous misdeeds neither directly nor circumstantially re-

---

[41] 13c B.N.A. Law Reprints, "Trade Regulation Cases Denied Certiorari 1979-1980", Brief for the United States in Opposition to Petition in No. 78-1872, pp. 63-64; Ass't. Atty. Gen Favretto, "Criminal Antitrust Prosecutions-The *Gypsum* Opinion", 5 CCH Trade Reg. Rptr. ¶ 50,412 at 55,919 (March 26, 1980).

[42] *See supra* note 35.

[43] In this connection, the bad act witnesses' testimony here established only that Petitioners had agreed to rig other bids; it did not, save by necessary inference, establish that they intended to agree. From the fact of prior agreements, the jury had to infer both intent to agree on the prior occasions and intent to agree as to the charged offense.

[44] LaFave & Scott, *supra* note 37. (emphasis added). This Court relied heavily on LaFave & Scott in its *Gypsum* decision. 438 U.S. at 441 n. 17, 443 n. 20, 445.

lated to the charged offense. This Court now should clarify its *Gypsum* opinion and restore logic to the courts' application of Rule 404(b) in conspiracy cases by announcing the rule adopted here by the trial court: basic intent to agree must be proved by direct and circumstantial evidence of the charged conspiracy, and not by prior, unrelated conspiracies.

3. Contrary To Settled Rules, The Sixth Circuit Failed To Defer To The Trial Court's Discretion In Concluding That The Evidence Was Admissible On A Ground Expressly Rejected By The District Court

One of the few matters involving Rule 404(b) about which the courts are in unanimous agreement is that the appellate court is to give great deference to the wide measure of discretion accorded to the trial courts in ruling on the admissibility of other crimes.[45] Here, the Sixth Circuit stood this rule on its head by concluding that the evidence was admissible on the ground *expressly rejected* by the trial court, with no suggestion that the trial court had abused its discretion in making the ruling.[46] This arbitrary substitution

---

[45] *See, e.g., United States* v. *Johnson*, 697 F.2d 735, 739 (6th Cir. 1983); *United States* v. *Baskes*, 649 F.2d 471, 481 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981); *United States* v. *Bohr*, 581 F.2d 1294, 1299 (8th Cir.), *cert denied*, 439 U.S. 958 (1978). While there is a conflict over whether an appellate court may affirm the admission of bad act evidence on a ground not presented to the district court, compare *United States* v. *Baldarrama*, 566 F.2d 560, 567 (5th Cir.), *cert. denied*, 439 U.S. 844 (1978) and *United States* v. *Gocke*, 507 F.2d 820, 824 n. 4 (8th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975) to *United States* v. *Pantone*, 609 F.2d 675, 682 (3rd Cir. 1979), it is a novel extension of this to affirm the admission of bad act evidence on a ground expressly rejected by the trial court. The sole decision which appears to have done so, *United States* v. *Weidman*, 572 F.2d 1199, 1201-1203 (7th Cir. 1978), has been correctly criticized as "a particularly egregious example of appellate cynicism." 22 Wright & Graham, *supra* note 17, § 5249 at 260-261 (Supp. 1982).

[46] Indeed, the Sixth Circuit resorted to the argument that the District Court had earlier found the evidence admissible, without recognizing either that the District Court recanted this finding

of an appellate court's whim for the district court's discretion so far departs from the accepted rule forbidding such rebalancing as to call for this Court's review.

D. This Court's Failure to Address Rule 404(b) Has Spawned Confusion and Conflict, And It Is Now Time to Delimit the Contours of the Rule

So widespread is the abuse of Federal Rule of Evidence 404(b) that the number of criminal defendants being effectively tried as recidivists is unknowable: "There is no question of evidence more frequently litigated in the appellate courts than the admission of evidence of other crimes, wrongs, or acts."[47] As leading commentators recognize (and as shown above), "despite the recurrence of the issue, the opinions are often poorly reasoned and provide little guidance to trial judges"[48] the decisions "often cannot be reconciled"[49]; the drafters of the rule "chose to leave the law in its messy state"[50]; and the rule itself "does nothing to clarify the issues, and may in some respects have muddied the waters even more."[51] While this Court has long recognized the severe prejudice which obtains when the accused's past alleged misdeeds are improperly aired at trial, *Michelson* v. *United States*, 335 U.S. 469, 475-476 (1948), it has never addressed the contours of Rule 404(b). The self-apparent importance[52] of the issue demands that this Court now do so.

---

or that it finally admitted the evidence on a ground which the Sixth Circuit never addressed.

[47] 22 Wright & Graham, *supra* note 17, § 5239 at 427-428 (1978). *Accord*, 2 Weinstein *Evidence* ¶ 404[08] at 404-47 (1982) (rule has spawned "more decisions than occasioned by any other single rule").

[48] 22 *Wright & Graham*, *supra* note 47, at 427-428.

[49] 2 Weinstein, *supra* note 47, at 404-45.

[50] 22 *Wright & Graham*, *supra* note 47, at 427-428.

[51] *Id.*

[52] "An obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality." *United States* v. *Burkhart*, 458 F. 2d 201, 204 (10th Cir. 1972).

This case presents the appropriate framework in which to address the scope of Rule 404(b), involving as it does all of the following: an extension of the rule to new types of cases; violation of the rule's express prohibition against using past misdeeds to show propensity to act illegally; the most frequently invoked exception to the general rule barring prior acts; and the novel case where the appellate court rests its decision on a ground expressly rejected by the trial court. Moreover, this is an antitrust prosecution and the Justice Department's criminal enforcement efforts have been and continue to be directed almost exclusively at alleged bid-rigging among construction contractors[53]; therefore, the issue is bound to recur in cases yet to reach this Court. Evidentiary standards in federal criminal trials ought not depend upon the defendant's fortuity to be tried in one circuit or another.

III. THE CONFLICT BETWEEN THE JURY INSTRUCTIONS HERE AND THOSE MANDATED BY THIS COURT'S GYPSUM OPINION REQUIRES REVIEW, WHERE THE DISTRICT COURT ERRONEOUSLY APPLIED GYPSUM TO A PER SE OFFENSE FOR PURPOSES OF ADMITTING BAD ACT EVIDENCE AND THEN FAILED CORRECTLY TO INSTRUCT THE JURY AS TO THE MENS REA STANDARDS PRESCRIBED IN THAT CASE

While the Sixth Circuit deemed it "unnecessary" to express a view on the applicability of *Gypsum's* intent standards to *per se* antitrust offenses, Petitioners submit that this case affords compelling reasons for this Court to do so because of the unique circumstances in which the issue arose.

---

[53] Assistant Atty. General Baxter, Statement Before the House Subcommittee on Monopolies and Commercial Law (Department of Justice Press Release, March 10, 1983) ("Our . . . prosecutions of criminal collusion among highway and airport contractors are still continuing, and appear likely to continue for some time to come. To date, this category of cases alone has resulted in the criminal prosecution of 209 individuals and 189 corporations in 15 states. We currently have under way investigations in several other states as well . . . .").

This Court has let stand the conclusion of every circuit court to address the issue that *Gypsum's* elevated intent standards are inapplicable to the *per se* criminal antitrust case and that therefore, the trial court is justified in failing to instruct the jury about *Gypsum* style intent.[54] What differentiates this case from those cases is that (1) the trial court here reached the *contrary* conclusion, but then used that conclusion to stab Petitioners with evidence of their prior bad acts; and (2) the trial court attempted to give the intent instructions mandated by *Gypsum*, but did so incompletely. Therefore, this Court should now decide whether *Gypsum's* intent standards[55] are applicable in *per se* offenses, lest courts seize on *Gypsum* style intent to create a false basis for admitting prior misconduct in *per se* cases[56], and lest courts properly invoking *Gypsum* fail to give the instructions required thereby to avoid the kind of error proscribed by *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) and more recently condemned in *Connecticut* v. *Johnson*, 103 S.Ct. 969, 978 (1983).[57]

---

[54] *See supra* notes 38-40.

[55] In *Gypsum*, this Court held that in at least some types of criminal antitrust offenses, the Government must prove in one of two ways that the accused intended to effectuate the object of the conspiracy: by proof of "action undertaken with knowledge of its probable anticompetitive consequences and having the requisite anticompetitive effects", or by proof that the accused acted "with the 'conscious object' of producing such effects", regardless of whether those effects came to pass. 438 U.S. at 444 & n. 21.

[56] If intent is neither "in issue", nor "an issue", Rule 404(b) affords no basis for the admission of other crimes, wrongs, or acts. Thus, if *Gypsum*-style intent is not a proper issue in a *per se* case, the trial court here plainly erred. Even if *Gypsum*-style intent is now held to be a requisite element of the *per se* criminal offense, it is error to admit similar acts to prove that element because direct and circumstantial proof of the charged agreement to rig bids, if believed, "makes it impossible to infer lack of the requisite intent." *United States* v. *Azzarelli Const. Co.*, 612 F.2d at 297-298.

[57] In failing to instruct the jury that it must first find that anticompetitive effects took place before it could convict on the standard of

IV. THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES THAT A COURT OF APPEALS STAY PROCEEDINGS BEFORE IT UNTIL THE APPELLANT IS MENTALLY ABLE TO CONSULT WITH HIS COUNSEL

Since November 11, 1982, Petitioner Vann has been without any cognitive abilities, including the ability to respond to or communicate with counsel in any manner. He has had no opportunity to review the Government's brief on appeal, nor to participate in the preparation of his reply brief, motion to supplement or strike, petition for rehearing, this petition for certiorari, or in the oral argument before the Sixth Circuit. Vann's counsel promptly alerted the Sixth Circuit to this condition and requested a continuance of the oral argument, including the suggestion that his constitutional rights would be jeopardized if the case were not continued. This application was denied.

A writ of certiorari should issue to resolve the important question as to whether the Sixth Amendment permits judicial interference with the guaranteed right of an accused to consult with counsel during the pendency of his direct appeal from a felony conviction, by proceeding despite notification that the accused has been totally incapacitated.[58] This precise question has never been addressed in any reported opinion, but this Court's prior decisions compel the conclu-

---

knowledge of probable anticompetitive consequences, the trial court here invaded the factfinders' province to find anticompetitive effects and invited conviction on an intent standard less rigorous than this Court established in *Gypsum*. An incorrect instruction on an essential element is rarely if ever harmless error. *Connecticut* v. *Johnson*, 103 S.Ct. at 978; *Bollenbach* v. *United States*, 326 U.S. 607, 614-615 (1946).

[58] Petitioner Vann does *not* argue that the Sixth Amendment guaranteed him either the right to an oral argument or to be present thereat. *Herring* v. *New York*, 422 U.S. 853, 863 n. 13 (1975); *Faretta* v. *California*, 422 U.S. 806, 842 (1975) (Burger, C.J., dissenting). His contention is limited to the Sixth Circuit's effective denial of his right to consult with counsel at all as to the appellate proceedings after November 11, 1982.

sion that Petitioner Vann's Sixth Amendment rights were violated.

A criminal defendant clearly has the right to the assistance of counsel at all critical stages of a criminal proceeding.[59] Prejudice is presumed and no express showing of prejudice is required.[60] Since at least 1963, this Court has held that the right to counsel extends to an appeal from a felony conviction.[61] This includes "argument and submission of the case and does not terminate with the filing of the notice of appeal and the making of the record available to the appellate court."[62]

The right to assistance of counsel has always included the right to consult with counsel. As stated in *Chandler* v. *Fretag*, 348 U.S. 3, 10 (1954):[63]

> A necessary corollary [to the right of effective assistance of counsel] is that a defendant must be given a reasonable opportunity to . . . consult with counsel; otherwise the right to be heard by counsel would be of little worth.

Because a lawyer "assistant, however expert, is still an assistant", the counsel provision recognizes the fact that "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[64]

This Court has zealously guarded the right of an accused to consult with counsel and virtually no interference with that right has been brooked.[65] For example, in *Geders* v.

---

[59] *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932) (the accused "requires the guiding hand of counsel at every step of the proceedings against him"); *see also, Brewer* v. *Williams*, 430 U.S. 387, 398 (1977); *Gideon* v. *Wainwright*, 372 U.S. 335, 339-340 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938).

[60] *Glasser* v. *United States*, 315 U.S. 60, 76 (1942).

[61] *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

[62] *Hoggatt* v. *Page*, 432 F.2d 41, 42 (10th Cir. 1970).

[63] *Accord*, *Powell*, 287 U.S. at 50; *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940).

[64] *Faretta* v. *California*, 422 U.S. 806, 819-820 (1975).

[65] *See, e.g., Herring* v. *New York*, 422 U.S. 853 (1975); *White* v. *Ragen*, 324 U.S. 760 (1945); *House* v. *Mayo*, 324 U.S. 42 (1945).

United States, 425 U.S. 80, 91 (1976), this Court held that an order preventing petitioner from consulting counsel during an overnight recess between his direct and cross examination "impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."[66]

Obviously, "an accused who is mentally incapable of consulting with counsel is denied both his right of effective assistance and his right of meaningful consultation." [67] This Court has stated in *Dusky* v. *United States*, 362 U.S. 402 (1960):

> [The test must be whether he has] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and whether he has] a rational as well as factual understanding of the proceedings against him.

Clearly, Petitioner Vann was unable to consult with counsel under this test.

The sole excuse offered by the Sixth Circuit for refusing the stay was that counsel on appeal was also trial counsel. But nothing in this Court's prior decisions intimates that the right to consult with counsel terminates in the District Court. Because no difference in the trial and appellate stages of a case has been deemed sufficient to dispense with the accused's right to counsel in his appeal as of right, no reason exists to leave that right's necessary corollary languishing below. This is especially true where, as here, the government was permitted to raise new issues on appeal, thus making

---

[66] In *Geders'* wake, numerous courts of appeal have ruled that orders barring attorney-client consultations during far shorter recesses violated the Sixth Amendment, explaining that the fundamentality of that right is such "that there should never occur any interference with it for any length of time, however brief, absent some compelling reason." *United States* v. *Allen*, 542 F.2d 630, 632-633 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977); *United States* v. *Conway*, 632 F.2d 641, 644-645 (5th Cir. 1980); *United States* v. *Bryant*, 545 F.2d 1035, 1036 (6th Cir. 1976). *Cf.*, *United States* v. *Vesaas*, 586 F.2d 101, 102 n. 2 (8th Cir. 1978).

[67] *Goodwin* v. *Swenson*, 287 F.Supp. 166, 178 (W.D. Mo. 1968),

consultation with the client all the more necessary. This Court's intervention is required lest the Sixth Circuit's evisceration of *Douglas* v. *California* be permitted to drive a wedge between the right to counsel on appeal and the right to consult counsel.

CONCLUSION

For all the reasons herein stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

.....

Murray S. Monroe
Counsel of Record for
Petitioner Vann
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

.....

Robert W. Ritchie
Counsel of Record for
Petitioner Melhorn
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661

OF COUNSEL:

William J. Seitz
Taft, Stettinius & Hollister
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

John E. Eldridge
Ritchie, Chadwell & Eldridge
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES E. MELHORN, (82-5384)
THOMAS P. VANN, (82-5385
Defendants-Appellants.

ORDER

(Filed March 8, 1983)

Before: KENNEDY and MARTIN, Circuit Judges; and HARVEY,* District Judge.

Defendants appeal their jury convictions for violations of the Sherman Act, 15 U.S.C. § 1, *et seq.*, contesting the admissibility of extrinsic act evidence, and asserting that the government violated their sixth amendment right of confrontation by admitting statements of co-conspirators into evidence pursuant to Fed. R. Evid. 801(d)(2)(E) without first establishing the unavailability of the declarant. For the reasons set forth below, we affirm the convictions.

Thomas P. Vann and James E. Melhorn are the President and Vice-President, respectively, of the Knoxville division of Ashland-Warren, Inc. (Ashland), a highway paving contractor.

* The Honorable James Harvey, United States District Court, Eastern District of Michigan, sitting by designation.

Ashland, Vann, and Melhorn were indicted on one count of rigging bids on interstate highway projects in Tennessee in violation of the Sherman Act, and on five counts of related mail fraud. The charges against Ashland, as well as the mail fraud counts, were severed and the individual defendants went to trial on the Sherman Act count. Both Vann and Melhorn were convicted by a jury of violating the Sherman Act, and the district court entered judgment, imposing suspended sentences of two years on Vann and one year on Melhorn, and ordering them to pay fines of $10,000 and $5,000, respectively.

This prosecution arose out of an agreement by highway construction companies to allocate among themselves federally assisted road projects on Interstate Highway 81 in northeastern Tennessee. Highway contracts are awarded through a competitive bid process.[1] Vann and Melhorn, as executives for Ashland, conspired with Carl Riddle and Stan Fugate, as executives for Interstate Paving Company, to allocate between themselves two paving contracts. They planned to arrange it so that Ashland would be low bidder on Contract No. 8148, while Interstate would be low bidder on Contract No. 8175.

Fugate contacted Vann and Melhorn sometime in early May, 1979, shortly after the State advertised 8148 for letting. The three men discussed rigging the bids. When the list of prospective bidders was published, Fugate again contacted Vann and Melhorn to divide-up the list of prospective bidders so that they would contact each potential competitor in an effort to influence his bid. Fugate contacted Ronnie and

---

[1] After the Federal Highway Administration approves a highway project, Tennessee conducts a bid 'letting'. The Tennessee Department of Transportation advertises the projects to be let and contractors then request bidding proposals. Several days prior to the letting, a list is compiled of the names of all the companies that have obtained proposals. Based on that list, all the contractors who had requested proposals must decide whether to bid and, if they so choose, must submit a sealed bid on the day of the letting. Each bidder executes an affidavit attesting to the fact that he has not 'rigged' the bidding. The project is awarded to the lowest bidder.

Buddy Pope of Pope Paving and requested that they not bid competitively on 8148. Fugate contacted Summers-Taylor, Inc. with the same message. Neither company bid on 8148. Fugate and Riddle were to contact certain other contractors, while Vann and Melhorn were to contact, among others, D. R. Allen & Son, Inc.

On the evening prior to the letting of 8148, May 17, 1979, appellants met with Fugate and Riddle. At this meeting, Vann indicated that he had been unable to contact D.R. Allen but would continue to try. Later that night appellants, Fugate, Riddle, and Hoyl Gill, an executive of American Limestone, a stone supplier, drove to Vulcan Materials, another stone supplier, to speak with Carl Register. Hoyl Gill stayed in the car while the others told Register that American Limestone was going to supply Ashland with the stone needed for the 8148 project. Register wanted to sell the stone for that project and, therefore, argued that it should be bid competitively. Register was told that he might be selected to supply the stone needed for 8175 when it obtained that project, but the issue was not resolved that evening.

Late that same night, Melhorn contacted Fugate and asked Interstate to submit a complementary bid on 8148 in an amount above $2.5 million. Interstate did so. The result of the bidding was as follows:[2]

D. R. Allen & Son, Inc.	$2,110,435.60
Hoover, Inc.	2,121,743.96
Ashland-Warren, Inc.	2,349,782.97
Interstate Paving Co.	2,504,328.08

D. R. Allen, the low bidder and recipient of the contract, and Hoover, Inc. had not been contacted by the conspirators. Vann had been unable to contact Allen and mistakenly decided that D. R. Allen was not a threat.

After D. R. Allen had been awarded the contract, Riddle and Fugate suggested to Vann that Ashland subcontract the project. Initially D. R. Allen refused Ashland's overtures but

---

[2] Appellants argue that all of the bids were below the state's estimate, indicating an absence of rigging.

it eventually subcontracted 8148 to Ashland for $250,000 — Ashland and Interstate each paid $125,000.

The State advertised Contract 8175 for letting on June 29, 1979. Fugate contacted Summers-Taylor and Pope, requesting that they not bid competitively on 8175. Each agreed. Fugate also contracted Malone Brothers and Benward, Inc., to inquire whether either was interested in bidding competitively on 8175. Neither company expressed an intent to do so. Riddle contacted several contractors regarding 8175, including Tillett Brothers. Interstate paid Tilletts $25,000 to submit a complementary bid of $2.7 million.

Vann and Fugate approached Nate Pendleton of Pendleton Construction and inquired as to whether Pendleton was interested in 8175. Pendleton originally claimed that he needed the work, but he eventually agreed to submit a complementary bid of $2.7 million in exchange for Fugate's offer to purchase a storage bin which Pendleton had been trying to sell.

On the night before the bidding, Fugate called Vann and gave him a complementary amount to bid on 8175. The result of the bidding on 8175 was as follows:

Interstate Paving Co.	$2,551,115.55
Ashland-Warren, Inc.	2,559,305.00
Tillett Bros. Const. Inc.	2,657,925.75
Pendleton Const. Corp.	2,726,068.00

Interstate was low bidder, but the State rejected all of the bids because they were too far over the estimated cost of the project. The State re-advertised 8175 for bidding on September 21, 1979. Prior to reletting, Fugate contacted Pope, Malone, and Pendleton, all of whom agreed either not to bid or to submit a complementary bid. Richardson, of Interstate, contacted Tillett to confirm that it would not bid. Fugate contacted Vann and instructed him to submit a complementary bid in approximately the same amount that had been bid the first time. Interstate was again low bidder and was awarded the project.

Extrinsic Act Evidence

At trial the prosecution submitted evidence of other bid-rigging operations in which Melhorn and Vann had participated to establish the element of intent to commit the offense charged. *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975) sets forth the guidelines to be followed in admitting extrinsic evidence to show intent or knowledge.[3] The similar act must bear a substantial similarity to the offense charged; must have occurred reasonably near in time to the offense charged; must be offered for a purpose 'in issue' and, therefore, be necessary; and must be more probative than prejudicial. The other incidents of bid-rigging were substantially similar to the offense charged and occurred within approximately one year – before or after – this incident. Accordingly, the first two requirements of *Ring* are satisfied.

Appellants assert that the third requirement of *Ring* was not met here because it was unnecessary to admit evidence of intent when intent was not 'in issue'. In *Ring*, this Circuit held that before prejudicial evidence of similar acts is admissible, the purpose for which the evidence is to be admitted must have been raised in substance, if not in words. Entry of a not guilty plea does not necessarily put every material fact 'in issue'. This Court identified a class of cases where criminal intent is normally inferable from the commission of the criminal act, for example, criminal mail fraud. Proof of the act of mailing gives rise to an inference of intent to mail. In those cases intent to mail is not a genuinely contested issue unless

---

[3] Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, plan, knowledge, identity, or absence of mistake or accident. (emphasis added)

The rationale for this rule is that "the recurrence of similar acts incrementally reduces the possibility that the given instance of illegal [conduct] is the result of inadvertance, mistake, or other innocent event." *U.S.* v. *Semak*, 536 F.2d 1142, 1145 (6th Cir. 1976).

the defendant pleads, for instance, that the mailing was done innocently or inadvertently. "But intent is not in issue when evidence of intent is inferable if the proscribed act is proven and defendant does not claim mistake or inadvertence." *Id.*, at 1009.

Relying upon language in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978) that intent may be inferred in a criminal antitrust prosecution from an act which has an anti-competitive effect on prices, *id.* at 466, appellants contend the evidence of other bid-rigging conspiracies should have been excluded as unnecessary. Some confusion arises from the fact that, as the *Gypsum* Court explained,

> In a conspiracy, two different types of intent are generally required – *the basic intent to agree, which is necessary to establish the existence of the conspiracy*, and the more traditional intent to effectuate the object of the conspiracy. – See W. LaFave & A. Scott, Criminal Law, 464-465 (1972).

438 U.S. at 443, n.20 (emphasis added). The parties to this action are in agreement that extrinsic act evidence was not admissible to show intent to effectuate the object of the conspiracy, which was the type of intent focused upon by the *Gypsum* Court, *id.* We, therefore, find it unnecessary to address that question. This dispute surrounds the admissibility of extrinsic act evidence to prove the basic 'intent to agree' element of a criminal anti-trust offense.

During their trials, appellants argued that while they had attended some meetings at which the rigging of contracts 8148 and 8175 was discussed, they were 'merely present' and never agreed to participate in the conspiracy. By asserting this 'mere presence' or 'lack of agreement' defense, appellants put intent to agree in issue. Accordingly, the evidence was 'necessary' within the meaning of *Ring*.

Appellants argue in the alternative that assuming the first three requirements of *Ring* have been satisfied, the evidence still should have been excluded as more prejudicial than probative. Evidentiary rulings rest in the sound discretion of the

trial court and will not be disturbed on appeal absent a showing of abuse of discretion. We find no such abuse.

Statements of Co-Conspirators

Fugate was allowed to testify about encounters he had with co-conspirators Malone, Renfro, and Pendleton. Fugate's testimony regarding Malone and Renfro merely consisted of an account of his contacts with those men in the furtherance of his conspiracy with appellants, and the fact that Malone and Renfro each stated that his company was not interested in bidding on Contract 8175. The importance of that testimony lay in Fugate's account of his own activities. That testimony was not hearsay and was clearly admissible. Whether or not Malone and Renfro actually had a lack of desire to bid on 8175 is unimportant and those statements were not admitted for the truth of the matter asserted. This was not hearsay evidence and was properly admitted.

Fugate's account of his contacts with Pendleton was more extensive. He explained various meetings and telephone conversations during which they discussed Pendleton's interest in Contract 8175, his desire to sell a hot storage bin, and his agreement to submit a complementary bid on 8175 in exchange for Interstate's purchase of the bin. Prior to admitting Fugate's testimony regarding Pendleton, there was an *in camera* meeting at which the trial judge concluded the evidence was clearly admissible under the co-conspirator exception to the hearsay rule.[4] We agree.

Appellants contend that even if the evidence was admissible under Fed. R. Evid. 801(d)(2)(E), they were denied their sixth amendment right of confrontation when the testimony was received without the prosecution having first established

---

[4] Fed. R. Evid. 801(d)(2)(E) provides:

> A statement is not hearsay if—
>
> • • • •
>
> (2) *Admission by party-opponent.* The statement is offered against a party and is • • • (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

the unavailability of the declarant, Pendleton. We need not intimate a view on whether the admission of evidence under an Fed R. Evid. 801(d)(2)(E) raises confrontation clause problems. Whether applying the rule that evidence admitted under the federal co-conspirator exception automatically complies with the requirements of the confrontation clause[5], or the rule that the declarant must be unavailable, unless the evidence is neither crucial to the prosecution nor devastating to the defendant[6], the testimony in dispute is admissible.

Appellants raise some additional arguments regarding the impropriety of jury instructions, the inadmissibility of lay witness opinion testimony, and the lack of substantial evidence on the record to prove they committed the crime charged in the indictment. These arguments lack merit.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

---

[5] *United States* v. *Enright*, 579 F.2d 980, 990 n.9 (6th Cir. 1978), *United States* v. *Perna*, 491 F.2d 253, 255 (6th Cir.), *cert. denied*, 417 U.S. 934 (1974). But see, *Campbell* v. *United States*, 415 F.2d 356, 357 (6th Cir. 1969); *Phillips* v. *Neil*, 452 F.2d 337, 345 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972). See also, *United States* v. *Papia*, 560 F.2d 827 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 271 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973), *reh'g denied*, 410 U.S. 948 (1973); *United States* v. *Clayton*, 450 F.2d 16, 20 (1st Cir.), *cert. denied*, 405 U.S. 975 (1972).

[6] *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981); *United States* v. *Fielding*, 630 F.2d 1357 (9th Cir. 1980), *reh'g denied and amended*, 645 F.2d 719 (9th Cir. 1981); *United States* v. *King*, 552 F.2d 833, 845-47 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States* v. *Snow*, 521 F.2d 730 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); *United States* v. *Puco*, 476 F.2d 1099, 1103 (2nd Cir.), *reh'g en banc denied*, *id.* at 1111, *cert. denied*, 414 U.S. 844 (1973), *citing United States* v. *Wright*, 588 F.2d 31, 38 (2nd Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 618, 620-621 (8th Cir 1975), *cert. denied*, 424 U.S. 971 (1976). See also, *United States* v. *Davis*, 578 F.2d 277, 281 (10th Cir. 1978).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES E. MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed January 13, 1983)

Upon consideration of the appellants' motion to supplement the record on appeal or in the alternative to strike portions of the appellee's brief, And

Further considering the response in opposition thereto,
It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES E. MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed February 17, 1983)

Upon consideration of the appellants' motion to extend time through May 23, 1983, in which to hold oral argument,

It is ORDERED that the motion be and it hereby is denied. The merits of the appeal can be argued without necessarily having consulted with appellants, where counsel on appeal was also trial counsel.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES E. MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed March 24, 1983)

Upon consideration of the appellee's motion requesting that this Court's order entered on March 8, 1983 be published, and

Further considering the response in opposition thereto,

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384/5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES E. MELHORN, and
THOMAS P. VANN,
Defendants-Appellants.

ORDER DENYING PETITION FOR REHEARING
(Filed May 13, 1983)

Before: KENNEDY and MARTIN, Circuit Judges; and HARVEY,* District Judge.

The Court not having favored rehearing en banc in the above case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

---

* The Honorable James Harvey, United States District Court, Eastern District of Michigan, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384/85

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed June 6, 1983)

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ JOHN P. HEHMAN

EXCERPTS FROM VOIR DIRE AND PRE-TRIAL MOTION TRANSCRIPT

Transcript of Colloquy on Confrontation Clause Issue

• • • •

[550] THE COURT: I'll hear you on your second motion in limine.

MR. RITCHIE: If it please the Court, this motion is filed out of an abundance of caution simply to raise before we get into the matter of testimony, the question of the co-conspirators — any co-conspirators' statement the government intends to introduce. To simply point out that the evidentiary rule 801D2E on co-conspirators' statement is not equivalent to the confrontation clause.

Under Dutton versus Evans, the government has to make a further preliminary showing of the unavailability of the declarant.

THE COURT: Dutton versus Evans was decided prior to the adoption of the Federal Rules of Evidence. Does that make any difference?

MR. RITCHIE: I don't believe it does, Your Honor, because what the Federal Rules of Evidence in the co-conspirators exceptions simply embodies what had basically been case law prior to 1970 when Dutton versus Evans was —

THE COURT: Let me ask you something else, Mr. Ritchie. I think you're making what has been a common error in my own consideration of the hearsay rule [551] and the distinction that is now quite clear under the Federal Rules of Evidence. Rule 801 is not an exception to the hearsay rule. Rule 801 says these declarations are not hearsay. 801D2E does not constitute an exception to the hearsay rule. It simply says it's not hearsay.

Now that's different from the discussion by the Supreme Court in the High versus Roberts case which talks about a clear exception to the hearsay rule.

MR. RITCHIE: It simply is our position that some pre-

liminary showing must regardless of whether it is called an exception to the hearsay rule or whether it's –

THE COURT: Preliminary showing of what? You think unavailability has to be shown?

MR. RITCHIE: I think number one, unavailability has to be shown and beyond that if they show unavailability –

THE COURT: At least their trustworthiness.

MR. RITCHIE: They have to show the matter of trustworthiness and they have to show the testimony is not devastating to the defense; they have to show generally –

THE COURT: Any evidence that tends to [552] show guilt I would characterize as devastating, would you not, Mr. Ritchie?

MR. RITCHIE: I would except that perhaps in the situation in Dutton versus Evans where they had something like 19 witnesses to the facts themselves to the point that it was – the proof was overwhelming as to the guilt of the defendant. And the court there said it paled into legal insignificance.

THE COURT: Does it make any difference that here we are dealing with a crime which consists of the agreement and how do you prove the agreement except by the declarations of it – whether verbal or non-verbal declarations of the alleged co-conspirators?

MR. RITCHIE: We submit, Your Honor –

THE COURT: The essence of the crime is the declaration.

MR. RITCHIE: Your Honor, the witness – I'm sorry.

THE COURT: Go ahead.

MR. RITCHIE: The witnesses who would have had primary contact with the defendants in this case, witnesses whom we have been led to believe are actually going to be here and on the witness stand, we're concerned about the statements of some other possible co-conspirators who have had primary dealings – not with these defendants [553] but with the government witnesses.

THE COURT: Give me an example of what you anticipate.

MR. RITCHIE: Mr. Edmond Pendleton, Your Honor, in the matter of purchasing or selling to Interstate Paving Company a silo and the effect of that agreement between Mr. Pendleton and Mr. Riddle and Mr. Fugate wherein apparently they agreed to purchase a silo, allegedly to keep the Pendletons off 8175.

The proof will show that though there may have been some discussion about the possible purchase in the presence of one of these defendants that the agreement as it related to 8175 if there was in fact one at that time when neither of these defendants were present. And so if they start quoting as a declarant, Mr. Edmond Pendleton as that part of the agreement that related to 8175 and the Pendleton's staying off –

THE COURT: Who will be testifying with respect to the alleged declaration?

MR. RITCHIE: Mr. Riddle and Mr. Walter Richardson, III, we anticipate, Your Honor and Fugate also.

THE COURT: And they conducted a conversation with Mr. Pendleton?

MR. RITCHIE: That's correct, Your Honor.

[554] THE COURT: They'll be testifying that statements were made by Mr. Pendleton?

MR. RITCHIE: That's correct, Your Honor.

• • • •

THE COURT: What do you say, Mr. Burley?

MR. BURLEY: As I read the motion in limine, Your Honor, I believe that the defense has completely misread the case of High versus Roberts.

[555] THE COURT: I can't stand that noise. See if you're standing on the wire.

MR. BURLEY: No.

THE COURT: All right. Turn it off. Go ahead.

MR. BURLEY: With respect to the defendant's reading of the Supreme Court 1980 decision of Ohio against Roberts, in the lawyers' edition at page 608, the court expressedly recognizes that reliability can be inferred without harm on

a case where the evidence falls within a firmly rooted hearsay exception.

Your Honor pointed out, of course, under the Federal Rules of Evidence co-conspirators' statements or statements by the party deponent, are deemed so reliable they are not even exceptions to the hearsay rule, they are just plain not hearsay, which is a very simple backward step to make.

• • • •

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Transcript of Colloquy and Ruling on Confrontation Clause Issue

---

• • • •

[118]

All right, ladies and gentlemen, step back into your jury room for a few minutes.

(Whereupon, jury left courtroom.)

All right, Mr. Burley, your question was what did Mr. Pendleton say to Mr. Fugate?

MR. BURLEY: Yes, sir.

THE COURT: And this was on a telephone call or in the meeting in Mr. Pendleton's room?

MR. BURLEY: Subsequent telephone call.

THE COURT: Is Mr. Pendleton going to be a witness?

MR. BURLEY: I don't believe so, Your Honor.

THE COURT: All right. Let me hear it. Let me hear the answer. What happened, Mr. Fugate?

THE WITNESS: Subsequent telephone call that evening, we bought the piece of equipment from Pendleton and in return for a complimentary bid on Contract 8175. I gave him the number to bid and that is the number he bid.

THE COURT: And this was a follow-up and conclusion of the deal he had suggested when you and Mr. Vann and he were in the room?

THE WITNESS: That was the conclusion, [119] yes, sir.

THE COURT: That just tied it up. It had been suggested by Mr. Pendleton in the room while you and Mr. Vann were in there. If you all would buy the equipment –

THE WITNESS: I don't think Mr. Pendleton made that suggestion. I don't think Mr. Pendleton made that suggestion but that is what happened.

THE COURT: All right. Was that suggestion made by anybody?

THE WITNESS: I can't recall whether it was or wasn't exactly. I don't know. I don't recall that much about it.

THE COURT: Go ahead, Mr. Burley. Does that complete the examination you want about this?

MR. BURLEY: Yes, Your Honor, that will be it.

THE COURT: Anybody want to –

MR. BURLEY: Other than to ask if Pendleton in fact submitted a bid as he requested.

THE COURT: At the price you suggested?

THE WITNESS: Yes, sir. Yes to both of those questions.

THE COURT: Gentlemen, I think that is [120] the clearest kind of 801DQE kind of co-conspirator type testimony and I'm going to give you a chance to take this to the Supreme Court and let them bite the bullet between the federal rules of evidence and the confrontation clause. I think that is the clearest kind of co-conspirator statement and I will let it in.

Bring the jury back in, Mr. Marshal. Your objection is overruled.

(Whereupon, jury entered courtroom.)

Counsel, approach the bench.

(At bench.)

In further explanation of the Court's ruling on this, I am not for closing you from making the same objection again to other testimony but in further explanation of the Court's ruling on this particular testimony, I think there is an issue necessary of truthfulness in this that appears from the fact that Mr. Vann was present at the time that the proposition

was first discussed over who was going to – how they were going to get Mr. Pendleton off this job and this was the conclusion of it and further corroborated by the fact that they submitted the bid in the amount suggested. I want that in the record for further explanation of the Court's ruling.

MR. RITCHIE: Can I put something in [121] the record to clarify it for Justice White?

MR. MONROE: Mr. Edwards first.

MR. RITCHIE: Whatever. In any event, we would point out that the government has not made an effort to make a showing of good faith or otherwise of the unavailability of Mr. Pendleton.

THE COURT: That is true.

MR. RITCHIE: And secondly, that his testimony does not reflect that the suggestion of the – contain any basis to find there was a suggestion of trade-off of the silo for the bid while the defendant Vann was in the room.

THE COURT: That is clear inference this Court draws from it and any other inference may be possible. That is clear inference this Court draws from it. I don't know what the jury is going to do. I draw it.

• • • •

Trial Transcript of Colloquy and District Court's Final Ruling on Uncharged Bad Acts

• • • •

[671] THE COURT: Pass it in.

All right, Ms. Sasamoto and gentlemen, before Mr. Hamil testifies, the Court intends to instruct the jury as follows: I am reading it to you now and then I will hear you if you wish to make any additions or changes.

Ladies and gentlemen, you will recall that the Court has previously admitted testimony from [672] Mr. Summers and Mr. Pope with respect to the alleged rigging or setting up of other contracts other than Contracts 8148 and 8175 which are the subject of this indictment.

I cautioned you at the time that you should consider this evidence for a very limited purpose. The Court is now about to permit the testimony of Mr. Hamil in a similar vein and I will instruct you again and further as to the purposes for which you may consider this evidence as well as that of Mr. Summers and Mr. Pope.

First, ladies and gentlemen, you must remember that the evidence of the commission of another crime is never evidence that these defendants Vann and Melhorn committed this particular crime charged in the indictment.

Such evidence of a prior wrongful act may not be considered by the jury as proof of a character trait of criminality or predisposition to crime. And that the defendant acted in conformity to such character trait or predisposition.

For instance, it would be totally improper for the government to prove a person had stolen something on a former occasion as proof of a charge that that same defendant stole something on a subsequent [673] occasion.

However you may consider the testimony of Messrs. Hamil, Pope and Summers on the question of the specific intent of Mr. Vann or Mr. Melhorn or both.

One of the essential elements of the crime charged here that is, an agreement or conspiracy to restrain trade is the intent to restrain trade or limit competition. The element of intent need not be so specific as to require demonstration that the conduct was undertaken with the conscious object of producing anti-competitive effects. It is sufficient that the conduct be shown to have been undertaken with knowledge that the proscribed anti-competitive effects would most likely follow from the agreement and conduct.

Intent is a state of mind and knowledge of the probable anti-competitive effects of a given action is also a state of mind.

You must first find beyond a reasonable doubt from other evidence other than that or prior criminal acts that the defendants Vann or Melhorn or both agreed to certain conduct with regard to Contracts 8148 and 8175. You may then consider the evidence of Messrs. Pope, Summers and Hamil giving it such weight as you think it deserves on the question

of whether Mr. Vann or Mr. Melhorn or both had the necessary intent.

[674] MR. BURLEY: Your Honor, I think it was about the second to last sentence. I think what we want to establish here is the intent to agree.

THE COURT: Mr. Burley, If you will recall from the Gypsum case, footnote 8B, –

MR. BURLEY: Yes, sir, I'm familiar with it.

THE COURT: – in which the majority of the court spelled out that there were two kinds of intent.

MR. BURLEY: Yes, sir.

THE COURT: One, intent to agree; the other, the intent to bring about the anti-competitive effects.

Now, if it is admitted on the first of those two – as you recall the court in Gypsym limited it to the second of those two types of intent. If it is on the intent to agree, that gets to whether or not there is an agreement and an agreement is the essence of a crime. That gets awful close to the Phillips case, Mr. Burley, commission of a prior offense is the equivalent of the commission of this offense or that the defendants acted in conformity with the previous conduct.

MR. BURLEY: I think Phillips is the case that I – was first referred to this morning so I rushed [675] out and read it. It seemed to me in Phillips the issue was not one of intent at all but one of identity.

THE COURT: It was but proof of prior act. Identity is one of those listed exceptions to 404B in the same way. I –

MR. BURLEY: We believe that similar acts are particularly appropriate in intent-type cases.

THE COURT: Well, I think they are, too, Mr. Burley, and that's the reason I admitted it. But it gets to be a very sophisticated kind of distinction as to whether or not the agreement itself which is the essence of the crime, can be proved by prior agreements.

MR. BURLEY: It can be –

THE COURT: Now the required intent to bring about the prohibitive acts in this case, Mr. Burley, for example: I think your evidence of prior criminal bid rigging is highly relevant and is exactly what 404B contemplated.

If the defendants are saying that we made the agreement but, you know, we had no intent to restrain competition or limit bids. We made an agreement to do certain things. Then that is where your prior knowledge once again drawing from the Gypsum case, the knowledge of the probable anti-competitive effects could and logically should follow from previous bid rigging where [676] they knew that the anti-competitive effect was existent. When it gets to the essence of the crime – that is the agreement, the first hurdle – I think they have to infer that from other circumstances.

Once again, it is a state of mind. They would infer that from other circumstances surrounding it but I'm reluctant to let them take into consideration the fact that they had agreed to prior criminal acts. That gets awfully close to convicting for trait of character or predisposition of criminality. That is what is bothering me, Mr. Burley. I will give you a chance to talk. You sit down.

MR. RITCHIE: I'm sorry.

MR. BURLEY: If I understand the defense, Judge, it is that they happened to be present and they happened to have conversation with Fugate and Riddle and others but they didn't agree and they didn't intend to agree and –

THE COURT: Of course, you are – your closing argument is going to be they did precisely what they agreed to do and that is evidence of an agreement, Mr. Burley.

MR. BURLEY: Certainly.

THE COURT: And you'll prove that by facts and circumstances and inferences other than the [677] inference from the commission of a former act that they did this act.

MR. BURLEY: That's true, Judge, but the fact they did similar things and said similar things on different occasions with different people would negate the inference that they were merely present and didn't intend to agree on this occasion.

THE COURT: Well, this is a fairly sophisticated fine line I'm attempting to draw here but I think it's appropriate, Mr. Burley.

The knowledge of the – on the question of the knowledge of the anti-competitive effects or knowledge of the probable anti-competitive effects I think certainly can be inferred from prior bid riggings where they knew what happened as the result there as well as some other facts and circumstances which you may prove or perhaps have already proved.

Beyond that, I'm reluctant to go, Mr. Burley.

MR. BURLEY: The Gypsum case involves something like telephone calls for price verification to avoid violations of the Robinson Patman Act –

THE COURT: Yes. In that case the defense was that they had the telephone calls; that they did everything that they were accused of doing – it was [678] just that they were doing it for a different purpose. They were doing it to comply with Robinson Patman rather than to produce an anti-competitive effect and the prior acts – analogizes to this case.

MR. BURLEY: If the only defense that the defendants want to make is that yes, we had these conversations but we were innocent, we were going to joint venture the subcontract, it is similar to Gypsum. But I understand their defense to go beyond that.

THE COURT: We don't know at this point what their defense is but from the Voir Dire and opening statement and cross-examination, I think part of their defense is going to be the mere presence is insufficient. Now, of course, you have substantially more than mere presence, Mr. Burley, already in the record.

You have overt acts in furtherance, for instance, not necessary to proof of a Sherman Act conspiracy because the conspiracy itself is the crime and overt actions are not required.

I will charge the jury to that effect, gentlemen. If you have any contrary thinking on that you can tell me about it. In my opinion of the law, an overt act is not necessary in a Sherman Act conspiracy. The conspiracy – the agreement itself is the crime in [679] what is prescribed by the law.

MR. BURLEY: We also have actual speaking words of agreement.

THE COURT: You have other things from which the jury

may infer and you may argue, of course. But all I'm suggesting to you at this time and I'm actually throwing it out for argument – I will listen to both of you on this. I have over the lunch hour and during the examination of Mr. Lewis Evans, I have been thinking about this and I have come up with this – I hope not sophistry but perhaps sophisticated distinction between the two types of intent.

I will hear you both on that.

MR. RITCHIE: May I –

THE COURT: All right.

MR. RITCHIE: Your Honor, it is exactly the dichotomy between the two types of intents discussed in Gypsum which is the basis for the objection which I tried to state before and I'm sure that I did not do so with sufficient –

THE COURT: I don't think you suggested this distinction, Mr. Ritchie. If you did, it went over my head.

MR. RITCHIE: I'm not sure I fully understood the distinction. I'm sure I didn't express it [680] well, but I did say I believe – or at least I tried to say that our defense is not that we lacked an intent either to agree or lacked an intent to restrain trade. I've not mentioned that because frankly, that was the furtherest thing from my mind. I understood Gypsum indicated they didn't have to show intent to restrain trade, simply knowledge.

THE COURT: Well, that is a form of evidence of intent. Gypsum just said that you don't have to demonstrate specific intent to the extent that you have to prove a guilty, malicious, willful kind of intent on the part – but it is sufficient for the purposes of Gypsum to prove a knowledge of the probable anti-competitive effect.

Now, the government has to prove anti-competitive effects – under this theory, they have to prove the agreement and then it is sufficient to prove –

MR. RITCHIE: Intent to agree.

THE COURT: No, not intent to agree. Intent in terms of knowledge of the probable anti-competitive effects. Now, that's the intent that it necessary to violate the Sherman Antitrust Act, to produce a restraint of trade.

Now, the intent to agree – let me pursue the distinction a little bit more. They could have [681] an intent to agree to what they thought was an innocuous agreement and have no knowledge of the probable anti-competitive effects of this alleged innocuous agreement.

MR. RITCHIE: Our defense is –

THE COURT: Do you want to tell me what it is? You don't have to but you may tell me now what it is.

MR. RITCHIE: I think I said it last Monday. I think our defense it – I know our defense is that we simply did not agree. We did not commit the act of agreement. If I understood what Your Honor indicated a moment ago, the issue upon which the jury could consider this prior act testimony was whether or not we had the intent, I suppose –

THE COURT: To produce an anti-competitive act.

MR. RITCHIE: Exactly. Let me say as clearly as I can, Your Honor, that is not our defense, speaking on behalf of Melhorn at all. And since it is not our defense, the prior act testimony should not come in before this jury. I think the Court has correctly stated that if it is to be considered that it would have to be on ths issue, if that's the defendant's defense. But I respectfully suggest to the Court that it's not and since it's not, the evidence can't come in.

[682] In all the preparation since early on, I never even gave any thought to defending on the basis of a lack of intent to have the restraint aspect of it carried forward – brought out – accomplished. It has simply been on the basis that we didn't agree.

Stan Fugate, Carl Riddle may have agreed among themselves, swept us along without us entering into into any agreement. We didn't agree and therefore we're not guilty.

So that I suggest to the Court under the analysis of the law of prior acts carries the Socratic logic forward to the conclusion that the jury should not hear prior act testimony. That's not the issue. I sincerely believe that.

THE COURT: Mr. Burley? Excuse me. Mr. Monroe, do you want to be heard?

MR. MONROE: I can't add much, Your Honor, except our

basic defense for Mr. Vann is as Mr. Ritchie articulated it. We did not agree to the charge set forth in paragraph 13 of the indictment. It was a very specific type of agreement set forth there and Tom Vann didn't agree to that. He wasn't a part of that particular agreement. I think you sort of summed it up in your charge when you said it was drawing a very sophisticated line. I would judge from what I have heard [683] so far this afternoon some of the lawyers here are having difficulty in making some of the distinctions here and I think without looking at the charge that I would think that charge would be confusing to the jury and I think we – basically our position is that we object to the introduction of this additional evidence and I think – carrying that forward, I think at least at this point I would have to object to the charge, too.

THE COURT: Mr. Burley?

MR. BURLEY: Well, I guess there are two things to be said, Your Honor. First is I think I correctly perceived Mr. Ritchie's defense but he does have a second step to it if he is going to put on Mr. Allen and Mr. Jenkins to try and prove that the agreement was not successful.

THE COURT: It doesn't have to be successful and I'll tell the jury that.

MR. BURLEY: With their intent to restrain trade.

THE COURT: I'm going to tell the jury it doesn't have to be a successful conspiracy. It doesn't have to accomplish the objective. The mere agreement to do it, to produce an anti-competitive effect is the evidence of the crime, whether it is successful or falls flat on its face. And, you know, if you object to the [684] relevance of Mr. Allen on that basis I may give the jury that kind of instruction at that time. Because Mr. Allen coming in here saying that he didn't agree to it and he never – and he intended to bid it hard all the time, he is not an essential member of the conspiracy if Ashland-Warren and Interstate and anybody else entered into it – Pope, Summers. That's sufficient Mr. Allen doesn't have to be a member of the conspiracy and you don't have to prove every charge in your bill of particulars as long as you prove sufficient numbers of them to constitute the element of a crime.

I'm not sure the testimony of Mr. Allen is even relevant.

MR. BURLEY: Well, we have come whole circle. We have to prove that there was an agreement and they are defending on the grounds that there wasn't an agreement and they didn't intend to agree and we certainly would like to argue the similar acts as demonstrating they did in fact have that intent to agree and did agree and the significance of the Gypsum case in my judgment is it's most recent denunciation by the Supreme Court that a good showing of intent is required in Sherman Act cases such as this before you convict. And as you know, we've all amended all our jury instructions to add an extra element of the intent [685] as the result of that decision. It is to meet that that we want to use similar acts.

THE COURT: The main thrust of Gypsum is that you cannot – it struck out the old jury instruction about presuming intent from an anti-competitive act. That was part of the Devitt and Blackmar instructions up until Gypsum.

MR. BURLEY: I have a case that if I could just cite to the Court:

THE COURT: Yes.

MR. BURLEY: Because I think it's –

THE COURT: I'm looking for all the help I can get.

MR. BURLEY: It was historic in leading cases on the subject where intent is an issue. That case is Krogmann against the United States 225 fed 2nd; 220 at 228, Sixth Circuit 1955.

Prior transactions on the part of a defendant in a criminal case similar to the one involved in which the element of intent is an issue has a bearing upon the issue of intent and are admissible in evidence for the purpose of proving or disproving the necessary intent.

And then I think the more recent Sixth Circuit cases probably have already been brought to the [686] Court's attention, court mentioned U.S. against Semak, 536 fed 2nd, 1142, Sixth Circuit 1976. U. S. against Grimes –

THE COURT: And that was decided before the federal rules of evidence or they didn't mention it in 404B in Semak. They decided it in line with 404B but didn't mention it.

MR. BURLEY: But I think the federal rules carried forward –

THE COURT: To common law.

MR. BURLEY: United States against Grimes 620 fed 2nd, 587, Sixth Circuit 1980, found no abusive evidence admitting evidence of similar crimes engaged in by the defendant in order to negate his claim of lack of criminal intent.

If I could go on I could cite the Seventh Circuit cases but I think that's a well-accepted proposition. We found a Second Circuit case called United States against Williams. I put the book back on the shelf where the defense had merely been being present wasn't an indicator of intent.

THE COURT: In a conspiracy charge?

MR. BURLEY: Yes, Your Honor. Cross-examination in a conspiracy case.

THE COURT: Seventh Circuit?

[687] MR. BURLEY: Second Circuit.

THE COURT: Give me that citation.

MR. BURLEY: We'll get it for you, Judge.

THE COURT: You don't have it?

MR. BURLEY: I don't have it in my pocket but I can get it in a couple minutes.

THE COURT: All Right. Get it in a couple minutes and bring it back. We'll take a recess.

(Whereupon, court was recessed.)
(Whereupon, court was resumed.)

THE COURT: Gentlemen, none of the cases you furnished the Court have been really instructive for this reason. In all of the cited cases there has been involved an act which was only criminal in nature if it was done with the requisite mens rae.

So mens rae was concomitant to an act. Here, the mens rae is the essence of the crime. No overt act is necessary in a Sherman Act conspiracy. It is the agreement in restraint of trade which is proscribed.

So, I cannot escape the conclusion that proof of entertaining the necessary intent – proof of becoming a part of a

conspiracy on a prior occasion [688] invites the inference that the requisite mens rae was present on this case. It gets awful close to proving someone committing a robbery on one occasion as being evidence of the fact that the person committed a robbery on the second occasion.

And although it would seem to be patently relevant, highly relevant — of state of mind, you can look at it from the other side and say suppose Mr. Melhorn walked out of the discussion with Mr. Vann and Mr. Fugate and said to himself or to the trees, I'm not going to do this.

Then proof of the participation in other conspiracies would, if admitted, lead to the possibility of conviction on this occasion for other crimes. It's a very troubling sort of thing and I can't find any instruction in the precedents. On the other hand, now, let's stop right there before we go to the other hand. Let's stop right there.

If the Court is right in that rationale, it would require the government to prove the entry into the agreement by other evidence and other crimes evidence, inferences from what was said in the conversations, inferences from overt acts in furtherance of the alleged conspiracy and from all the facts and circumstances of that particular series of events without consideration of [689] other crimes.

On the other hand, under the Gypsum case in order for the act to be criminal it must require more than an agreement; it must be an agreement in restraint of trade and not only must it have an anti-competitive impact or effect, the defendant must have known the probable anti-competitive effect of the agreement.

Now, the defendants say that they haven't raised that and under the United States versus Ring in the Sixth Circuit, admission of other crimes evidence on the element of intent that has not been raised as a defense is more prejudicial than probative.

I cannot agree that the defendants have not raised that. They may say they haven't raised it but in fact they have. There has been vigorous cross-examination on whether or not this was in fact a discussion to rig bids or merely to allocate

the work to the competitor closest to the job who had the shortest haul, and whether or not the discussion with Mr. Allen was an innocent subcontracting, straight business deal for which there is no criminality attached or whether this was all in furtherance of the original conspiracy to keep Mr. Allen out of Sullivan County, keep him from setting up an asphalt plant in Sullivan County and furnishing [690] competition in the future.

In other words, the place that the Court is coming to is the place that the Court was before the recess, that the government will be required to prove the agreement by the facts and circumstances surrounding the alleged agreement and Mr. Melhorn's or Mr. Vann's or both of their entry into that agreement.

Having proved an agreement beyond a reasonable doubt, the jury will be instructed that having found the existence of an agreement beyond a reasonable doubt that they must also find beyond a reasonable doubt that the agreement had any competitive impact or effect and furthermore that the defendants Vann and Melhorn knew of the probable anti-competitive effect of the agreement.

Upon the latter evidentiary requirement, the other crimes evidence becomes highly relevant if the defendants Vann and Melhorn entered into other conspiratorial bid rigging in order to obtain an anti-competitive effect, then that is highly relevant to the question of whether or not the present agreement – the jury having found the existence of such an agreement beyond a reasonable doubt – that Mr. Vann and Mr. Melhorn entertained the requisite knowledge of the probable anti-competitive effect of such a proven agreement.

[691] Now, gentlemen, that may be as the Court suggested earlier, an exercise in sophistry. I don't think it is because as I say, I think this type of conspiracy, Sherman Act conspiracy is **sui generis.**

Every other conspiracy requires proof of an overt act. Now, that in itself is a safety guard. Requiring proof an an overt act eliminates the problem I spoke of a moment ago. That is the innocent presence at a discussion and a later decision that

I'm not going to go along with it. Because of proof of an overt act and the defendant's acquiescence therein or participation therein is a protection against conviction of an innocent alleged conspirator.

Here, the essence of the crime is the agreement to restrain trade. So, the Court will try to make the jury understand the government must first prove beyond a reasonable doubt the existence of an agreement and that the defendants' participation in the agreement – agreement thereto – willingness to go along there with may be inferred from all the facts and circumstances surrounding the particular agreement.

Thereafter, the government must prove that the agreement had an anti-competitive effect and the government must go further and prove that the defendants Vann and Melhorn knew the probable anti-competitive [692] effect on this, the other crimes, other conspiratorial bid rigging are highly relevant in terms of the knowledge that the defendants may have had.

The Court has considered the other available evidence that the government might have on this point and finds this evidence to be the most relevant and perhaps only available evidence on that particular state of mind of the defendants Vann and Melhorn and further has conducted the balancing test required by 403 of the rules of evidence and finds this evidence to be of such a probative value that it far outweighs any potential prejudice that may result.

Does everybody understand the ruling of the Court?

MR. RITCHIE: May I make one comment for the record, though?

THE COURT: Yes, sir. Do you want to renew your motion for a mistrial?

MR. RITCHIE: Twice. Let me make one comment. I really don't think I will have any disagreement with the government on this although they know a lot more about the Sherman Antitrust Act matters than do I. Unless I am badly mistaken, the charge of bid rigging is a per se Sherman Act violation and when the charge is bid rigging, the government need not show

knowledge [693] of anti-competitive effect of the type shown in Gypsum.

If I am correct and I'm in the presence of the Court and counsel on both sides who know a lot more about Sherman Antitrust Act matters than I do, but if I am correct, then the analogy would break down I think.

THE COURT: Mr. Ritchie, if you characterize it as a price fixing agreement, you are correct in that certainly in a civil action it is a per se violation. It is unreasonable per se. However, doesn't that border on the type of presumptions that the criminal law has now discarded that – for instance, the presumption of sanity. There is no longer a presumption of sanity once it is fairly raised. And the very thing that the Gypsum case addressed that the jury. – I think the government has to prove that this has an anti-competitive effect.

MR. RITCHIE: Your Honor may be right. For the record, however, I will renew my motion for a mistrial.

THE COURT: Proof of any essential element of any crime beyond a reasonable doubt is now the rule. It has always been thought to be the rule but we sort of glazed over some of those areas of legal presumptions and they no longer exist in the criminal law [694] as I understand it.

MR. RITCHIE: Far be it from me to be in favor of presumption in a criminal case. I have always been against those.

THE COURT: Presumption works against the defendant.

MR. RITCHIE: That's exactly right, sir.

THE COURT: You are in favor of presumption rules?

MR. RITCHIE: Well, there are certain ones I am in favor of. We would wholly renew our motion for mistrial at this time, Your Honor.

THE COURT: All right. Mr. Monroe.

MR. MONROE: I will make mine short, Your Honor.

It seems to me that the effect in any agreement is going to be peculiar to the set of facts that it involved in a litigation. I think if this indictment or this agreement alleged in the indictment proves or develops an effect on competition, it is because of the facts of this case. I don't think that what hap-

pened somewhere else at some other time has any relevance as to what the effect might be here. It seems to me —

[695] THE COURT: Mr. Monroe, I don't want to cut you off but it seems to me although there may be differences in the fact situations between the setting up of the Hamlin County job or the setting of 8195 or 7795, the upper end of the interstate of the setting up of the June bidding of 1979 to which Mr. Hamil will testify, there may be some mechanical differences in the way that it was done but the net effect of all of them was to complementary bid to establish a price, to allocate work and to eliminate competition. Although there may be mechanical difference, the effort is the same and it is the willingness to bring about that effect and the knowledge that that was the probable effect that the government has to prove and on which I'm allowing this evidence.

MR. MONROE: Your Honor, I don't think they have to go to another act to prove that. It seems to me that that is the basis of the bottom line on your reasoning that they have to go to some other county, some other job —

THE COURT: Mr. Monroe, you have through your cross-examination, the inference of your questions or the inference at least the Court has drawn from some of your questions, has been that this whole business on 8148 and 8175 was entirely innocent; that Ashland-Warren [696] had the plant that was nearest to 8148 so this was simply a businessman's decision; they discussed it and said Ashland, you're the logical person to get that bid.

And on 8175, Interstate had the nearest plant and so as honorable businessmen who are neighbors and go to parties together, we are not allocating work, we're just recognizing reality. You have got the closest plant so you get that job and we're not going to bother you on it.

It's not eliminating competition, we're just recognizing reality. It costs us 12¢ a ton mile to haul this asphalt and we have a large haul distance of 20 miles and you have an average haul distance of 9 miles so you go on and bid that job and if you want us to stick in a bid, we will. But it's innocent;

we are not trying to allocate your work or rig any bids or set any prices. We're just recognizing reality.

MR. MONROE: That isn't quite the case, Your Honor.

THE COURT: Sir?

MR. MONROE: That isn't quite my case.

THE COURT: Well, you have certainly left that inference from some of your rather vigorous cross-examination.

[697] MR. MONROE: Certainly my case is that 8148 is innocent.

THE COURT: You'll take any figure they'll buy.

MR. MONROE: I'm stronger on some but not the others.

It just doesn't seem to me that without developing a similar set of facts in a different county that's going to prove anybody's intent at all.

I don't think you can transfer a person's intent from one job to somewhere else to this situation.

THE COURT: It's not so much the question of intent as it is the knowledge of the effect of the anti-competitive effect which the Supreme Court in Gypsum equated with intent. It was a lesser standard than specific intent to willfully violate the law.

It said knowledge of anti-competitive effect is tantamount to intent, criminal intent in a Sherman Act case. That's the way I read Gypsum in footnote 8B.

MR. MONROE: Well, I just disagree with you, Your Honor, on the basis that intent from job outside the county be transferred into 8148 to show that 8148 had any effect on competition whatsoever.

[698] THE COURT: Well, knowledge of the effect of an agreement can be transferred. This is what this Court is holding.

MR. MONROE: I think you and I disagree on that.

THE COURT: Well, gentlemen and Ms. Sasamoto, I have thought about this a long time. I may have come down with the wrong result and if I have the Sixth Circuit will be quick to advise me.

Yes, Mr. Burley?

MR. BURLEY: Might I put the citation of the Williams case in the record?

THE COURT: Yes, sir, I read your Williams case. The Williams case as Court stated in the outset involved a bank robbery or bank larsony and intent was concomitant element of the crime. I think it is distinguishable on that ground. That's the Second Circuit case you're talking about, United States versus Williams in the Second Circuit.

Mr. Burley: 577, fed 2nd, 188.

Second point if I could, Your Honor. The government proposes the per se instruction in its proposed instruction no. 21 and the elements of the offense are set forth in instruction no. 15 and the fourth element of the offense in that instruction is [699] extract the Gypsum instruction you just mentioned.

I want to point that out to meet what Mr. Ritchie just said, to point out the fact that we all understand that under Gypsum the government has to either prove a general intent to agree an anti-competitive effect or a specific agreement that affects neither here nor there.

THE COURT: Well, the Court takes some consolation in the fact that neither side agrees with me. That might be indication of the rightness of my position.

• • • •

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S. Constitution Amendment VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . and to have the Assistance of Counsel for his defence.

Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal.

Federal Rule of Evidence 404(b), 28 U.S.C. Federal Rule of Evidence 404(b), ("F.R.E. 404(b)") provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Federal Rule of Evidence 801(d)(2)(E), 28 U.S.C. Federal Rule of Evidence 801(d)(2)(E), ("F.R.E. 801(d)(2)(E)") provides in pertinent part:

> A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES E. MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed July 6, 1983)

Upon consideration of the appellants' motion for a further stay of mandate pending application for writ of certiorari,
It is ORDERED that the motion be and it hereby is granted.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

Office-Supreme Court, U.S.
FILED
AUG 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-36

In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS P. VANN AND JAMES E. MELHORN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

JOHN J. POWERS, III
MARGARET G. HALPERN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioners' Confrontation Clause rights were violated by the admission of co-conspirators' prior statements in conformity with Fed. R. Evid. 801(d)(2)(E).

2. Whether evidence of petitioners' prior participation in bidrigging conspiracies was properly admitted under Fed. R. Evid. 404(b) to prove intent to enter the bidrigging conspiracy, which was put at issue by petitioners' arguments to the jury.

3. Whether petitioner Vann's Sixth Amendment right to consult with counsel was violated by the court of appeals' decision not to postpone argument due to Vann's illness where his trial counsel had already filed all briefs on the merits without an objection on this ground, and where petitioner's motion to postpone oral argument was made only eight days prior to the date scheduled for argument.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Delta Airlines, Inc. v. *August*, 450 U.S. 346 13

Dutton v. *Evans*, 400 U.S. 74 ..... 6, 7, 8

Helvering v. *Gowran*, 302 U.S. 238 10

Killian v. *United States*, 368 U.S. 231 12

Krumholz v. *Goff*, 318 F.2d 911 (on reh'g) 10

Miree v. *DeKalb County*, 433 U.S. 25 13

Ohio v. *Roberts*, 448 U.S. 56 ..... 7, 8

Olympic Fastening Systems, Inc. v. *Textron, Inc.*, 504 F.2d 609, cert. denied, 420 U.S. 1004 10

PAAC v. *Rizzo*, 502 F.2d 306, cert. denied, 419 U.S. 1108 10

Park v. *Huff*, 506 F.2d 849, cert. denied, 423 U.S. 824 7

United States v. *Baldarrama*, 566 F.2d 560, cert. denied, *sub nom. Bensor* v. *United States*, 437 U.S. 906 10

Page

Cases—Continued:

United States v. *Baron*, 602 F.2d 1248, cert. denied, 444 U.S. 967 10

United States v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101, cert. denied, 444 U.S. 840 11

United States v. *Cargo Service Stations, Inc.*, 657 F.2d 676, cert. denied, 455 U.S. 1017 11

United States v. *Continental Group, Inc.*, 603 F.2d 444, cert. denied, 444 U.S. 1032 11

United States v. *Fielding*, 630 F.2d 1357, on reh'g, 645 F.2d 719 7

United States v. *Gibbs*, 703 F.2d 683, vacated and set for reh'g en banc, No. 82-1096 (3d Cir. May 19, 1983 and July 21, 1983) 6

United States v. *Gocke*, 507 F.2d 820, cert. denied, 420 U.S. 979 10

United States v. *Koppers Co.*, 652 F.2d 290, cert. denied, 454 U.S. 1083 11

United States v. *Maher*, 645 F.2d 780 10

United States v. *Martinez*, 555 F.2d 1248, cert. denied, 434 U.S. 924 7

United States v. *McKinney*, 707 F.2d 381 7

United States v. *Nickerson*, 606 F.2d 156, cert. denied, 444 U.S. 994 12

United States v. *Park*, 421 U.S. 658 ..... 8, 9

United States v. *Peacock*, 654 F.2d 339 7

United States v. *Perez*, 658 F.2d 654 6-7

Page

Cases—Continued:

United States v. *Semak*, 536 F.2d 1142 8

United States v. *Society of Independent Gasoline Marketers*, 624 F.2d 461, cert. denied, 449 U.S. 1078 11

United States v. *United States Gypsum Co.*, 438 U.S. 422 ..... 9, 10-11

Constitution, statute and rules:

U. S. Const. :

Amend. VI 12

Confrontation Clause 5, 6, 7

Sherman Act, Section 1, 15 U.S.C. 1 2

Fed. R. Evid. :

Rule 101 10

Rule 404(b) 8, 9, 10

Rule 801(d)(2)(E) 5, 6, 8

Rule 1101 10

Miscellaneous:

E. Cleary, *McCormick on Evidence* (2d ed. 1972) 8

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-36

THOMAS P. VANN AND JAMES E. MELHORN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) and its order denying petitioner Vann's motion to postpone oral argument (Pet. App. 10a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1983. A petition for rehearing was denied on May 13, 1983 (Pet. App. 12a). The petition for a writ of certiorari was filed on July 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 18, 1981, a federal grand jury in the Middle District of Tennessee indicted Ashland-Warren Inc. ("Ashland"), the nation's largest highway paving contractor, as well as petitioners Thomas P. Vann and James E. Melhorn, who were the president and vice president, respectively, of

Ashland's Knoxville, Tennessee, division. The indictment charged the company and the individuals with one count of rigging bids on interstate highway projects in Tennessee, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and five counts of related mail fraud. The Sherman Act count against the individuals was severed from the remaining counts and from all charges against Ashland. At the close of a ten-day trial, the jury found both Vann and Melhorn guilty on the antitrust count. The district court imposed suspended sentences of two years on Vann and one year on Melhorn and ordered them to pay fines of $10,000 and $5,000, respectively.

1. Petitioners do not challenge the sufficiency of the evidence presented against them at trial. Briefly, the evidence established that petitioners, as executives of Ashland, and Carl Riddle and Stan Fugate, as executives of Interstate Paving Company, Ashland's ostensible competitor, agreed to divide between themselves two contracts to be let during 1979 by the State of Tennessee for work on Interstate 81. The four men agreed to rig the bids so that Ashland would be low bidder on Contract No. 8148, while Interstate would win Contract No. 8175, which was to be bid a few months later. Tr. 74, 91-93, 293-296.[1] Fugate, Vann, and Melhorn also determined which prospective bidders each company would contact in an effort to talk them out of bidding competitively on No. 8148. Tr. 77-80. The night before the bids were submitted on No. 8148, petitioners Vann and Melhorn met with Riddle and Fugate and reached a firm agreement that Ashland "would be the contractor on Contract 8148 and when in fact 8175 came,

[1] "Tr." refers to the trial transcript.

[Interstate] would be the prime contractor on that job." Tr. 96; see also Tr. 91-93, 293-296.[2]

Later that night Melhorn called Fugate and asked Interstate to submit a "complementary" bid — that is, an intentionally high bid — on No. 8148; Melhorn requested that Interstate submit a bid greater than $2.5 million. Tr. 103, 301-302. Interstate complied with Melhorn's request. Ashland bid approximately $2,350,000, but lost the job when D.R. Allen, a company that Vann had been unable to reach, submitted a lo bid. Tr. 105, 302-303. Vann told Riddle that he had made a "bad gamble" with respect to Allen and had assumed (erroneously) that Allen would not submit a bid. Tr. 302-303. After numerous conversations and meetings during the ensuing month between representatives of Ashland, Interstate, and Allen, an agreement was reached pursuant to which Vann, Melhorn, Riddle, and Fugate ultimately paid Allen $250,000, which was provided by Interstate and Ashland in order to have No. 8148 subcontracted to Ashland. As part of that arrangement, Allen also agreed not to bid on No. 8175. Tr. 312, 770-771.

The conspirators next turned their efforts toward rigging the bids on No. 8175 to allow Interstate to win that contract. To this end, Fugate and Riddle contacted several companies, none of which evinced an interest in the project. Tr. 112-115, 513-515, 553. Two other companies were given

---

[2]Later that same night, Vann, Melhorn, Riddle and Fugate met with personnel of Vulcan Materials, a supplier of quarry stone. Vann, acting as principal spokesman, told Vulcan that Ashland and Interstate "anticipated running [No. 8148] out of Ashland's plant" and purchasing the necessary crushed stone from Vulcan's competitor. Tr. 99, 161-162, 256-259. To mollify Vulcan, the conspirators suggested, among other alternatives, that Vulcan could sell stone to Interstate when it won No. 8175. Tr. 257, 295. Finally, the four conspirators offered to have Ashland purchase some of the stone for No. 8148 from Vulcan. Tr. 300

payments in exchange for agreeing to submit "complementary" bids.[3] Tr. 123. Finally, on the night before the bidletting, Fugate called Vann and asked him to submit a complementary bid of approximately $2.6 million. Vann agreed, and bid as requested. Tr. 122-123, 329.

Although the bidding came out as the conspirators had planned, the State rejected Interstate's bid as too high and rescheduled the bidlatting for three months later. GX 27, 28, Tr. 123. In the interim, Vann and Fugate renewed their agreement to rig No. 8175. Tr. 124-125. Once again, Fugate called Vann on the night before the letting and requested Vann to submit a bid on No. 8175 in approximately the same amount as Ashland's original bid. Vann agreed and submitted the bid as requested. Tr. 129. Interstate won the job with approximately the same bid that had originally been rejected by the State as too high. G.X. 32, Tr. 129-130.

2. The court of appeals affirmed petitioners' convictions in an unpublished order. The court first rejected petitioners' argument that evidence of similar acts of bidrigging had been improperly admitted. The court noted that at trial petitioners had argued that they were "merely present" at bidrigging meetings and had "never agreed to participate in the conspiracy." The court reasoned that "[b]y asserting this 'mere presence' or 'lack of agreement' defense, appellants put intent to agree in issue." Pet. App. 6a. The court also rejected petitioners' contention that the trial court abused its discretion in admitting the evidence. *Id.* at 7a.

---

[3]Tillett Brothers was paid $25,000 in exchange for its agreement to submit a complementary bid of $2.7 million on the project. Tr. 316-322, 758-768. And when Vann and Fugate approached Nate Pendleton, another competitor, on the night before the bidletting to ask if Pendleton planned to bid on No. 8175, Pendleton responded that "he needed some work" and that he had a storage bin for sale. Tr. 116. Later that night, Fugate called Pendleton and worked out an agreement in which Fugate agreed to buy the storage bin and Pendleton agreed to submit a complementary bid of $2.7 million on No. 8175. Tr. 116-122.

The court next rejected petitioners' contention that co-conspirators' statements had been admitted in violation of the Confrontation Clause. The court found that two of the statements at issue had not been admitted for the truth of the matters asserted, but only to explain the activities of the witness. The court therefore concluded that these statements were not hearsay and had properly been admitted. *Ibid.* The court found that admission of the remaining statements was proper under Fed. R. Evid. 801(d)(2)(E) and the Confrontation Clause. Pet. App. 7a-8a. The court expressly declined to decide whether statements admissible under the Federal Rules of Evidence automatically comply with Confrontation Clause requirements. *Ibid.*[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with prior decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners do not dispute the fact that the co-conspirator testimony to which they object was properly admitted pursuant to Fed. R. Evid. 801(d)(2)(E). Rather, they contend (Pet. 10-15) that even if a co-conspirator statement statisfies that rule, its admission may nevertheless violate the Confrontation Clause. They assert that the court of appeals' decision in this case "rested in part" (Pet. 11) on a contrary interpretation of the Confrontation Clause and thus conflicts with decisions of this Court and other courts of appeals. In fact, however, petitioners incorrectly state the holding of the court below, and the conflicts they allege simply do not exist.

---

[4]The court rejected petitioners' remaining arguments without discussion (Pet. App. at 8a), and petitioners do not seek review of those issues.

The out-of-court declarations in question were admitted into evidence through the testimony of Fugate. As the court of appeals properly found (Pet. App. 7a), much of his testimony concerning his encounters with other co-conspirators was not admitted for the truth of the matters asserted therein. Such testimony raises no Confrontation Clause issue since it merely described Fugate's own activities. *Ibid.* The remaining statements, which were admitted under Fed. R. Evid. 801(d)(2)(E), did not mention either petitioner or purport to describe any of their actions or statements.

On these facts, the court of appeals expressly declined to decide "whether the admission of evidence under * * * Fed. R. Evid. 801(d)(2)(E) raises Confrontation Clause problems." Pet. App. 8a. The court observed, however, that the statements satisfied any independent Confrontation Clause requirements because the evidence was "neither crucial to the prosecution nor devastating to the defendant * * *" (Pet. App. 8a). Under these circumstances, there was no violation of the Confrontation Clause. *Dutton* v. *Evans*, 400 U.S. 74 (1970).

Petitioners' claim (Pet. 10-12) of a conflict among the circuits is also incorrect. The Third Circuit opinion on which petitioners (Pet. 10-12) and amicus National Association of Criminal Defense Lawyers (Br. 13) rely — *United States* v. *Gibbs*, 703 F.2d 683 (3d Cir. 1983) — has been vacated and set for rehearing en banc on this issue. *United States* v. *Gibbs*, No. 82-1096 (3d Cir. Orders of May 19, 1983 and July 21, 1983). The opinion below is also fully consistent with Ninth Circuit precedent holding that unavailability need not be proved where the co-conspirators' statements are neither "crucial" to the prosecution nor "devastating" to the defense. See *United States* v. *Perez*,

658 F.2d 654, 661-662 (9th Cir. 1981).[5] Similarly, the Fifth Circuit has held that otherwise admissible co-conspirator statements do not violate a defendant's Confrontation Clause rights even where unavailability of the absent declarant has not been shown. See *United States* v. *Martinez*, 555 F.2d 1248, 1249 (5th Cir.), cert. denied, 434 U.S. 924 (1977)); *Park* v. *Huff*, 506 F.2d 849, 860 (5th Cir.) (en banc), cert. denied, 423 U.S. 824 (1975).[6]

Nor does the opinion below conflict with prior decisions of this Court. In *Dutton* v. *Evans, supra*, this Court rejected a Confrontation Clause challenge to the admission of co-conspirator testimony under state law. The plurality opinion in *Dutton* viewed the question presented by co-conspirator testimony solely in terms of the "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." 400 U.S. at 89 (plurality opinion). This ruling was not reversed in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), as petitioners contend (Pet. 10-15). The *Roberts* Court stated that the Confrontation Clause places two constraints on the introduction of otherwise admissible hearsay: (1) in "the usual case," the evidence must be necessary, *i.e.*, "the prosecution must either produce, or demonstrate the unavailability of, the

---

[5]Another Ninth Circuit opinion cited by petitioners (at Pet. 11 n.7), *United States* v. *Fielding*, 630 F.2d 1357, 1366-1367 (9th Cir. 1980), was vacated on rehearing and replaced by an opinion that decided the case on nonconstitutional grounds. See 645 F.2d 719, 728, n.16 (9th Cir. 1981). Cf. *United States* v. *McKinney*, 707 F.2d 381 (9th Cir. 1983) (admission of statement violated Confrontation Clause because it did not fall within rule for adoptive admissions; dictum concerning relationship between Confrontation Clause and co-conspirator exception).

[6]In *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), cited by petitioners (Pet. 11 n.7), not only were the declarants unavailable (they were dead), but the court inferred that their statements were reliable because they fell within the co-conspirator exception.

declarant whose statement it wishes to use against the defendant"; and (2) the evidence must satisfy certain "indicia of reliability." 448 U.S. at 65-66. But contrary to petitioners' suggestion, *Roberts* did not involve either the Federal Rules of Evidence in general or Rule 801(d)(2)(E) in particular. See 448 U.S. at 58-61. And when the Court stated that a showing of unavailability was required "in the usual case," it was careful to state explicitly that "[a] demonstration of unavailability, however, is not always required," citing *Dutton*. See 448 U.S. at 65 n.7. Indeed, the Court noted that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66.[7]

2. Petitioners also contend (Pet. 15) that the court of appeals improperly upheld the admission of prior similar acts — in this case, prior instances of bidrigging — to show a propensity to commit the crime at issue. On the contrary, however, admission of that evidence was upheld under Fed. R. Evid. 404(b), which expressly provides that evidence of prior criminal acts is admissible to prove, among other things, intent, knowledge, or the absence of mistake or accident. See also *United States* v. *Park*, 421 U.S. 658, 676-678 (1975); *United States* v. *Semak*, 536 F.2d 1142, 1145 (6th Cir. 1976). A decision to admit such evidence may be reversed only if the trial court abused its discretion. E. Cleary, *McCormick on Evidence* § 190, at 452-454 (2d ed. 1972). Whether, on the particular facts of this case, the court of appeals correctly concluded that the district court did not abuse its discretion in admitting the testimony in question pursuant to Fed. R. Evid. 404(b) does not raise an issue of general importance warranting review by this Court.

---

[7]Petitioners never challenged the reliability of the co-conspirator declarations, either by cross-examining the government's witness on this point or by calling the absent co-conspirators themselves.

In any event, the district court did not abuse its discretion in this case. Petitioners argued that, although they had been present at the bidrigging meetings at issue here and had heard the rigging of these bids being discussed, they were "merely present" and had not agreed to rig bids.[8] See Voir Dire Tr. 147-148, 156; Tr. 37, 45, 93, 283. The Sixth Circuit correctly held that petitioners thereby put at issue the question of their intent to conspire (Pet. App. 6a).[9] Evidence of their prior participation in such conspiracies was consequently admissible to establish their intent to agree and to negate inadvertence, mistake or other innocent reasons for unlawful conduct.[10] Fed. R. Evid. 404(b); *United States* v. *Park, supra.*

---

[8]Petitioners have implied that the government improperly offered the similar acts evidence to prove their propensity to commit the offense charged (see Pet. App. 5). This implication is false, as is clear from government counsel's repeated statements in the in camera hearings that the evidence was being offered to rebut the defendants' "no intent" or "mere presence" defense. See Tr. 385-386, 603, 609-611, 674, 684-685.

[9]Petitioners suggest (Pet. 16-19) that the Court should review this case to resolve the question whether evidence of prior similar acts is admissible when intent is simply an element of the offense and is not contested. That question is not presented here, since petitioners squarely placed intent in issue by claiming that their presence at bidrigging meetings was entirely innocent.

[10]Petitioners also contend (Pet. 21-22) that per se Sherman Act offenses are sui generis and thus beyond the scope of Fed. R. Evid. 404(b) because the basic intent to agree, which is the only *mens rea* that need be proved in per se cases, "is simply part of * * * the 'act' part of the crime — the agreement itself" (Pet. 22). Similarly, amicus curiae The Committee of Criminal Antitrust Defense Counsel argue (Br. 12) that this Court should grant review to decide "whether basic intent to agree is a separate issue from the act of agreement." This argument has no merit. If the basic intent to agree were not an element of a per se offense, no proof of mens rea would be required in such cases. But in *United States* v. *United States Gypsum Co.* 438 U.S. 422, 436 (1978), this Court concluded: "We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses." And neither petitioners nor amicus cites any case accepting their novel argument. In

3. Petitioners contend (Pet. 25-26) that this Court should grant review to decide whether in a per se Sherman Act prosecution, the government must prove an intent to effectuate the agreement's unlawful objective, as well as the basic intent to agree, or whether proof of the latter, coupled with proof of the illegal agreement, suffices. That issue, however, is not posed by the present case. As petitioners acknowledge (Pet. 26), every court of appeals that has considered the issue since *United States* v. *United States Gypsum Co.*, 438

---

any event, since petitioners did not ask the district court to omit the instruction requiring the jury to find a basic intent to agree, they cannot now complain that no such element was required. Moreover, the Federal Rules of Evidence contain no exception for Sherman Act cases (see Fed. R. Evid. 101 and 1101). Thus, Rule 404(b) is applicable to the testimony in question.

Petitioners further complain (Pet. 23) that the court of appeals failed to defer to the trial court's discretion, because the appellate court disagreed with the trial court as to the basis for the statements' admission into evidence. After first admitting prior evidence of bidrigging on the proper ground — to show petitioners' intent to enter the bidrigging conspiracy — the trial court then decided that evidence of prior bidrigging was admissible to show intent to effectuate the object of the conspiracy. However, as the court of appeals noted (Pet. App. 6a), the government is not required to prove the latter type of intent in per se cases. Contrary to petitioners' assertion, the court of appeals' affirmance of the trial court's admission of the evidence on different grounds is not a basis for review by this Court. The settled rule is that an appellate court must affirm the decision below if the result is correct, even if the district court relied on a wrong ground or gave a wrong reason. *E.g.*, *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937); *Olympic Fastening Systems, Inc.* v. *Textron, Inc.*, 504 F.2d 609, 618 (6th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *Krumholz* v. *Goff*, 318 F.2d 911, 912 (6th Cir. 1963) (on reh'g); *PAAC* v. *Rizzo*, 502 F.2d 306, 308 n.1 (3d Cir. 1974), cert. denied, 419 U.S. 1108 (1975). This principle is fully applicable to appellate review of evidentiary rulings. See, *e.g.*, *United States* v. *Maher*, 645 F.2d 780, 783-784 (9th Cir. 1981); *United States* v. *Baron*, 602 F.2d 1248, 1250-1252 (7th Cir.), cert. denied, 444 U.S. 967 (1979); *United States* v. *Baldarrama*, 566 F.2d 560, 567 (5th Cir.), cert. denied *sub nom. Bensor* v. *United States*, 437 U.S. 906 (1978); *United States* v. *Gocke*, 507 F.2d 820, 824 n.4 (8th Cir. 1974), cert. denied, 420 U.S. 979 (1975).

U.S. 422 (1978),[11] has held that the intent element of a Sherman Act violation is proven by evidence that the defendant knowingly conspired to engage in conduct deemed illegal per se, such as bidrigging.[12] While the district court in this case instructed the jury that the government must also prove that petitioners' participation in the bidrigging conspiracy was undertaken with the knowledge that their acts would have probable anticompetitive effects and that such effects occurred or that petitioners acted with the purpose of producing anticompetitive effects, this instruction merely increased the government's burden of proof and could only benefit petitioners.[13] And since petitioners do not dispute that the government's evidence in this case established their knowing participation in a bidrigging conspiracy, it is clear that the government proved the only intent element relevant in a per se Sherman Act case.[14]

---

[11]In *United States Gypsum Co.*, the Court noted the two types of intent that must generally be proved in conspiracy cases and held that in certain antitrust prosecutions the jury must be instructed concerning both types of intent (438 U.S. at 434-446).

[12]See, *e.g.*, *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 682-683 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 293-296 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Society of Independent Gasoline Marketers*, 624 F.2d 461, 464-465 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-466 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1105 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

[13]To be sure, the district court admitted certain prior bad acts to prove this intent, but as the court of appeals correctly held (Pet. App. 5a-7a), that evidence was admissible to prove the basic intent to agree.

[14]Petitioners suggest (Pet. 26-27 n.57) that the district court should have instructed the jury "that it must first find that anticompetitive effects took place before it could convict on the standard of knowledge of probable anticompetitive consequences * * *." But such an instruction was given in this case at petitioners' request (Tr. 1063-1064) even though it was unnecessary in a case charging a per se violation of the

4. Petitioners also contend (Pet. 27) that Vann's Sixth Amendment right to consult with counsel was violated because the court of appeals refused to postpone oral argument after Vann suffered a heart attack and lapsed into a coma during the pendency of the appeal. This argument has no merit. As Vann concedes (Pet. 27 n.58), the court had no obligation to hear oral argument at all. And as the court of appeals aptly observed (Pet. App. 10a), since appellate counsel had also served as trial counsel, there was no need to postpone oral argument in a case that had already been briefed. Petitioner Vann's Sixth Amendment rights were protected fully by his representation throughout his appeal by experienced and very able counsel familiar with the case.

Vann also suggests (Pet. 28) that the court's refusal to postpone argument effectively denied him his right to counsel as to all appellate proceedings, including the filing of his reply brief and other pleadings preceding oral argument. However, Vann failed to object to the filing of any pleadings, including his reply brief.[15] It thus seems quite clear that the court's refusal to postpone oral argument had no effect

---

Sherman Act. See pages 9-10 n.10, *supra*. However, petitioners' instruction merely placed a greater burden of proof on the government than the law requires. Petitioners may not seek review to correct errors that could have hurt only the government. See, *e.g.*, *Killian* v. *United States*, 368 U.S. 231, 258 (1961); *United States* v. *Nickerson*, 606 F.2d 156, 158 (6th Cir.), cert. denied, 444 U.S. 994 (1979).

[15]Petitioners requested and received a two-week extension of time to file their reply brief on the ground that Vann was unconscious and unable to confer with counsel. See Motion of Appellants Vann and Melhorn for Extension of Time, filed November 15, 1982; granted by Order dated November 16, 1982. Petitioners' reply brief and their two unsolicited supplemental memoranda on the Confrontation Clause issue were filed without objection or request for further postponement. Petitioners did not move to postpone oral argument, set for February 23, 1983, until February 15, 1983. See Motion of Appellant Vann for Extension of Time, filed February 15, 1983.

on the preparation of the reply brief or any of Vann's other submissions, all of which had already been filed without objection. Moreover, this Court will not consider an issue not raised below. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

JOHN J. POWERS, III
MARGARET G. HALPERN
Attorneys

AUGUST 1983

DOJ-1983-08

Office-Supreme Court, U.S.
FILED
SEP 13 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-36

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS P. VANN and
JAMES E. MELHORN

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MURRAY S. MONROE
Counsel of Record

William J. Seitz
TAFT, STETTINIUS & HOLLISTER
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838
Attorneys for Petitioner Vann

(Counsel continued on inside cover)

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

ROBERT W. RITCHIE
Counsel of Record

John E. Eldridge
RITCHIE, CHADWELL & ELDRIDGE
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661

Attorneys for Petitioner Melhorn

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF CASES AND OTHER AUTHORITIES .. II

INTRODUCTION 1

I. THE SIXTH CIRCUIT'S DECISION IS INCONSISTENT WTH *OHIO* v. *ROBERTS* AND DECISIONS OF OTHER FEDERAL APPELLATE AND STATE SUPREME COURTS. 2

(A) The Sixth Circuit's Decision Squarely Raises Important Confrontation Issues And Is Inconsistent With *Ohio* v. *Roberts*, 448 U.S. 56 (1980) 2

(B) The Sixth Circuit's Decision Conflicts With Other Appellate and State Supreme Court Decisions. 5

II. THIS CASE RAISES IMPORTANT QUESTIONS AS TO THE PROPRIETY OF THE SIXTH CIRCUIT'S INTERPRETATION OF F.R.E. 404(b). .. 7

(A) This Is Not A Fact-Specific Case And This Court Should Set Standards For The Admission Of Evidence Under Rule 404(b). 7

(B) This Court Should Define The Proper Relation Of Rule 404(b) And The Issue Of "Intent" In A *Per Se* Sherman Act Prosecution. .. 8

III. THE DENIAL OF PETITIONER VANN'S SIXTH AMENDMENT RIGHT TO CONSULT WITH COUNSEL REQUIRES REVIEW. 11

CONCLUSION 13

TABLE OF CASES AND OTHER AUTHORITIES

I. CASES

Page

Burns v. *Ohio*, 360 U.S. 252 (1959) 11

Continental Baking Co. v. *United States*, 281 F.2d 137 (6th Cir. 1960) 9

Dutton v. *Evans*, 400 U.S. 74 (1970) 3-6

Faretta v. *California*, 422 U.S. 806 (1975) 12

Glasser v. *United States*, 315 U.S. 60 (1942) 12

Griffin v. *Illinois*, 351 U.S. 12 (1956) 11

Mayer v. *City of Chicago*, 404 U.S. 189 (1971) 11

Ohio v. *Roberts*, 448 U.S. 56 (1980) 2-6

People v. *Dement*, 661 P.2d 675 (Colo. 1983) 6, 7

United States v. *Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970) 10

United States v. *Fleishman*, 684 F.2d 1329 (9th Cir.), *cert. denied*, 103 S. Ct. 464 (1982) 6

United States v. *Gibbs*, 703 F.2d 683 (3d Cir. 1983) .. 5

United States v. *Koppers Co.*, 652 F.2d 290 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981) 9

United States v. *McKinney*, 707 F.2d 381 (9th Cir. 1983) . 6

United States v. *Pantone*, 609 F.2d 675 (3d Cir. 1979) .. 7

United States v. *Park*, 421 U.S. 658 (1975) 10

United States v. *Peacock*, 654 F.2d 339 (5th Cir. 1981), *on reh.*, 686 F.2d 356 (5th Cir. 1982) 6

United States v. *Perez*, 658 F.2d 654 (9th Cir. 1981) .. 5

United States v. *Socony Vacuum Oil Co.*, 310 U.S. 150 (1940) 8

Page

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 10

Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 8

II. CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. Amend. VI (Confrontation Clause) 2, 3

15 U.S.C. § 1 (Sherman Act) 7-11

18 U.S.C. Federal Rules of Criminal Procedure 52 12

28 U.S.C. Federal Rules of Evidence 404(b) (Other Crimes, Wrongs, or Acts) 7-11

28 U.S.C. Federal Rules of Evidence 801(d)(2)(E) (Co-Conspirator Admissions) 2, 4, 5

United States Supreme Court Rule 38.1 12

Sixth Circuit Court of Appeals Rule 7(e) 12

Colo. Const. Art. II § 16 6

III. OTHER AUTHORITIES

American Bar Ass'n Section on Antitrust Law, *Jury Instructions in Antitrust Cases 1964-1976* (1978) 10

LaFave and Scott, *Criminal Law* (1972) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-36

THOMAS P. VANN and
JAMES E. MELHORN

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

Petitioners submit this Reply Brief in support of their Petition for a Writ of Certiorari. Petitioners disagree with many of the facts stated by the Government. For example, the Government's contention that Petitioners reached a "firm agreement" (Govt. Br. at 2) to rig the two contracts cites to record testimony which is immediately preceded by the

statement that such an agreement was dependent on "if everything and everyone was contacted on this job the way we were supposed to do." (Trial Tr. at 96). Principally, however, Petitioners object to the Government's implication that the sufficiency of the evidence against them was not challenged. Petitioners did challenge the sufficiency of the evidence below. The only reason they did not here was because insufficiency of the evidence is not ordinarily a reason for granting certiorari.

I. THE SIXTH CIRCUIT'S DECISION IS INCONSISTENT WITH OHIO V. ROBERTS AND DECISIONS OF OTHER FEDERAL APPELLATE AND STATE SUPREME COURTS

(A) The Sixth Circuit's Decision Squarely Raises Important Confrontation Issues And Is Inconsistent With Ohio v. Roberts, 448 U.S. 56 (1980)

In its Brief the Government does not dispute that it did not establish in the District Court (1) that the co-conspirators were unavailable (2) that the challenged statements were only of peripheral importance or (3) that cross-examination would not be useful. Further, it does not dispute that the challenged statements constituted substantially all the proof as to 40% of the Government's case; that they played a substantial and important part of its Involuntary Bill of Particulars; that the prosecution relied on these statements to urge conviction of Petitioners; that these statements were admitted by the District Court for their truth under F.R.E. 801(d)(2)(E); and that the District Court admitted them on the theory that F.R.E. 801(d)(2)(E) was coterminous with the Confrontation Clause and satisfaction of it satisfied the Confrontation Clause. Furthermore, in its Brief the Government recognizes that under *Roberts* the Confrontation Clause places two constraints on the introduction of otherwise admissible hearsay (1) "in the

usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant . . . and (2) the evidence must satisfy certain indicia of reliability".

The Government's threshold argument apparently is that much of the evidence did not mention Petitioners by name and presumably therefore did not incriminate them. Even the Sixth Circuit assumed that much of the testimony incriminated Petitioners.[1] The District Court so stated.[2] The very purpose of introducing the evidence was to incriminate Petitioners, and the Government so argued to the jury.[3] The Government's position is untenable.

The Government's principal argument is that the Sixth Circuit did not rule on the Confrontation Clause at all (Br. at 6) or if it did, that it properly sanctioned the admission of the evidence under *Dutton* v. *Evans*, 400 U.S. 74 (1970). (Br. at 6-7).

Clearly, the Sixth Circuit did decide Confrontation Clause issues. It stated (Op. 9-10, Pet. App. 8a) that the testimony was admissible under either of two "rules":

(a) ". . . the federal co-conspirator exception automatically complies with the requirements of the Confrontation Clause . . ." or

(b) ". . . the declarant must be unavailable, unless the evidence is neither crucial to the prosecution nor devastating to the defendant. . ."

Both alleged rules involve issues under the Confrontation Clause. Both Petitioners and Amicus point out the long history culminating in *Roberts* under which the Confrontation Clause has been held not to be coterminous with the hearsay

---

[1] *See* Op. at 9 (Pet. App. 7a).

[2] *See* Trial Tr. 120-121 (Pet. App. 18a-19a).

[3] Trial Tr. 931-932, 1026.

rule.[4] The Government does not deal with this issue. By its silence, the Government concedes, as it must, that the Sixth Circuit was in error in this conclusion. Since it was one of the bases on which the Sixth Circuit affirmed the decision below, this alone requires reversal, or at least deserves clarification by the Supreme Court.

The Government's main argument is that *Roberts* only requires a showing of unavailability in the "usual case." The implication is that this is not the usual case and that the Sixth Circuit properly admitted the evidence under its alternate standard quoted in (b) above. In the first place, this standard is erroneous. In *Roberts*, the Court carved out a careful and narrow exception based on whether the "utility of confrontation" is as remote as it was in *Dutton*.[5] This is discussed in detail in the Amicus Brief at 9-13.[6] But even if the Sixth Circuit's alternate standards were correct, there is no proof or finding below that this was the situation in this case. In this case the evidence was admitted on the theory that satisfaction of 801(d)(2)(E) satisfied the Confrontation Clause. The District Court told Petitioners to take the issue to the Supreme Court if they felt otherwise. As an afterthought, the Government, in the Court of Appeals, raised the question of whether production of the co-conspirator could be excused on the basis of an exception to *Roberts*. The Government apparently takes the position that it has carte blanche to avoid the teachings of *Roberts* after the fact and without any restrictions. This case thus raises questions as to the scope of the exception, which party has the burden of proving it, and

---

[4] Pet. at 10-11, Amicus National Ass'n of Criminal Defense Lawyers ("Amicus") Br. at 5-8.

[5] Contrary to the Government's argument, Petitioners do not contend that *Roberts* reversed *Dutton*, but rather that *Roberts* re-emphasized to the lower courts that *Dutton* involved a very unique factual matrix.

[6] *See also*, Pet. at 10, 13-14.

what, if any, record is required in the District Court to support it.

The Government's argument that there is no reason for the Supreme Court to rule on the interrelationship between *Roberts*, *Dutton*, and the co-conspirator hearsay rule is without merit.[7]

(B) The Sixth Circuit's Decision Conflicts With Other Appellate and State Supreme Court Decisions

While the Third Circuit's unpublished orders in *United States* v. *Gibbs*[8] setting that case for an *en banc* rehearing postpones until the *en banc* decision the existence of a clear conflict between *Gibbs* and this case, those orders demonstrate the need for guidance to the lower courts on the interplay between the Confrontation Clause and F.R.E. 801(d)(2)(E). The Third Circuit's current indecision exemplifies that the question here presented is of general importance and substantial legal merit.

And, while *Gibbs* most clearly conflicts with the Sixth Circuit's decision here, the Government's contention that no other decision does is simply incorrect.

In *United States* v. *Perez*, 658 F.2d 654, 661 (9th Cir. 1981), the court held (with *Roberts*) that unavailability need not be shown where the "utility of trial confrontation is remote",

---

[7] The Government quotes from *Roberts* that "*reliability* can be inferred . . . where the evidence falls within a firmly rooted hearsay exception." (Br. at 8). As the Government concedes, *Roberts* states that both unavailability and reliability must be shown. Indeed, under *Roberts*, reliability issues are not addressed until *after* the unavailability issue is addressed: "The second aspect [reliability] operates once a witness is shown to be unavailable." 448 U.S. at 65. Such a suggestion reads half of the *Roberts* test out of existence.

[8] 703 F.2d 683 (3rd Cir. 1983).

and in dicta said that non-crucial, non-devastating testimony "*might* not" be subject to the *Roberts* rule. The court did not hold that unavailability need not be proved where the co-conspirators' statements are neither crucial nor devastating. Subsequent Ninth Circuit decisions have noted that "crucial v. devastating" is at most a factor relating to the reliability prong of *Roberts* and that it is a factor whose "relevance [has been] debated" even there.[9]

In *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), the Fifth Circuit held that *Roberts* "resolved" the issue of the Confrontation Clause and the co-conspirator exception, thus making its task "considerably easier" by reference to the two-prong *Roberts* test. In so doing, it pointed out that the unavailability prong was satisfied — the witnesses were dead. The Fifth Circuit's pre-*Roberts* cases cited by the Government are irrelevant. Whatever the rule before *Roberts*, the Fifth Circuit's rule now is that production or an unavailability showing is a Confrontation Clause predicate to admissibility under F.R.E. 801(d)(2)(E).

Finally, in *People* v. *Dement*, 661 P.2d 675, 679-682 (Colo. 1983), that state's Supreme Court held that Colorado's Sixth Amendment counterpart was violated because, applying *Roberts*:

> The prosecution failed to carry *its burden* to produce the hearsay declarant for cross-examination or to establish her unavailability. . . . [D]efense counsel had several legitimate areas of inquiry to explore on cross-examination. . . . This is not a case where the utility of trial confrontation is remote. Compare this case with *Dutton* v. *Evans*, *supra*.[10]

---

[9] *United States* v. *McKinney*, 707 F.2d 381, 384 n.5 (9th Cir. 1982); *United States* v. *Fleishman*, 684 F.2d 1329, 1339 (9th Cir.), *cert. denied*, 103 S. Ct. 464 (1982).

[10] 661 P.2d at 681-682 (emphasis added).

Thus, for all the same reasons why the Sixth Circuit's decision conflicts with *Gibbs*,[11] it conflicts with *Dement*.

II. THIS CASE RAISES IMPORTANT QUESTIONS AS TO THE PROPRIETY OF THE SIXTH CIRCUIT'S INTERPRETATION OF F.R.E. 404(b)

(A) This Is Not A Fact-Specific Case And This Court Should Set Standards For The Admission Of Evidence Under Rule 404(b)

The Government's first argument is that all the Sixth Circuit did was to rule on the District Court's proper use of its discretion. The argument is ludicrous. The Court of Appeals established a rule of law for the admission of bad act testimony in *per se* Sherman Act cases – by asserting a "lack of agreement defense, Appellants put intent to agree in issue" (Op. at 8, Pet. App. 6a) and that 404(b) testimony was thereby admissible on the issue of "intent to agree." The Sixth Circuit used this rule to justify the admission of this testimony in this case, and that rule results in the admission of such testimony in every *per se* Sherman Act case.

This standard was expressly rejected by the District Court on the basis that it would permit the introduction of evidence of propensity in direct violation of the first sentence of Rule 404(b).[12] The Sixth Circuit not only did not affirm the exer-

---

[11] Pet. at 10-12, 14.

[12] The Government argues that the Sixth Circuit properly affirmed the trial court for reaching the right result for a wrong reason. (Govt. Br. at 10 n. 10). None of the cases cited, however, hold that an appellate court can rest its decision on a ground which the district court expressly rejected. They simply hold that an appellate court can affirm the admission of evidence on a ground that the district court did not consider. In any event, this rule has not been universally applied in Rule 404(b) cases. *See United States* v. *Pantone*, 609 F.2d 675, 682 (3rd Cir. 1979). Its wisdom is dubious. Inevitably, the evi-

cise of the District Court's discretion, it reversed the very exercise of that discretion by the District Court. By no stretch of the imagination are Petitioners presenting an abuse of discretion issue nor is it presented by this record.

In any event, the recurrence of Rule 404(b) issues and the conflict in the cases arising from the absence of any uniform standard for admitting such evidence requires this Court to provide such guidance.[13] The Government does not contest that this Court has provided such standards as to prior, analogous issues.[14]

(B) This Court Should Define The Proper Relation Of Rule 404(b) And The Issue Of "Intent" In A Per Se Sherman Act Prosecution

The Government's principal argument is that Petitioners' denial of the agreement to rig bids put intent to agree in issue and that the bad act testimony was thereby admissible under the second sentence of Rule 404(b).[15] Petitioners concede that this was the Sixth Circuit's position. However, the decision deserves review for all of the reasons stated in the Petition and in the Amicus Committee Brief. These include the facts that: under this theory, uncharged bad acts will be admissible in all *per se* Sherman Act cases because the denial of agreement is the only defense;[16] in no prior *per se* Sherman

---

dence is submitted to the jury under instructions which are inapplicable and the jury is not instructed on the ground sanctioned by the appellate court.

[13] *See* Amicus Committee of Criminal Antitrust Defense Counsel ("Amicus Committee") Br. at 5-8.

[14] *E.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981).

[15] Govt. Br. at 8-9.

[16] Pet. at 20, Amicus Committee Br. at 9-10. Indeed, in *per se* cases, good motives or innocent intent do not preclude a conviction for having agreed. *United States* v. *Socony Vacuum Oil Co.*, 310 U.S.

Act case has such testimony been held admissible to show 'intent to agree';[17] in several prior Sherman Act cases, and in the District Court here, such testimony was held *inadmissible* to show intent;[18] Petitioners at trial expressly disavowed an intent-based defense;[19] the Sixth Circuit's interpretation of the Rule completely reads out the first sentence of that Rule prohibiting the introduction of propensity evidence;[20] and, under the Sixth Circuit's standard, contrary to the standards in other circuits, bad act testimony is admissible regardless of the extent to which intent to agree is either a disputed issue or more than a nominal issue inferable from proof of the criminal act.[21] Nowhere in its Brief are these issues addressed by the Government.

150, 221-223 (1940); *United States* v. *Koppers Co.*, 652 F.2d 290, 293-294 (2nd Cir.), *cert. denied*, 454 U.S. 1083 (1981); *Continental Baking Co.* v. *United States*, 281 F.2d 137, 144 (6th Cir. 1960) ("Once the defendant admits the agreement, he may say no more for it is illegal per se".)

[17] Pet. at 19-20.

[18] Pet. at 20, 23-24, Amicus Committee Br. at 12 n.22, 13.

[19] Pet. at 18-19, Pet. App. 24a-26a. This express disavowal of an intent-based defense renders misleading the Government's unsupported suggestion (Br. at 9 n.9) that Petitioners were claiming that they had an innocent intent when they were present at various meetings.

[20] Pet. at 20-23; Amicus Committee Br. at 10. The Government's contention (Br. at 9 n.8) that it did not offer the testimony to prove Petitioners' propensity to conspire fails to address that the prosecutor told the District Court that he wanted to use such testimony to prove that Petitioners "did in fact . . . agree" to the charged conspiracy. Pet. App. 27a. It also overlooks that the prosecutor summed up the significance of the bad act testimony to the jury as follows (Trial Tr. 838): "Just as in dividing up contracts 8148 and 8175, Vann and Melhorn's plan was always to split the work with the closest competitor by means of bid rigging. This is just what they did in this case."

[21] Pet. at 16-19, Amicus Committee Br. at 5-8.

As the District Court pointed out, proof of prior Sherman Act agreements to prove intent to agree is tantamount to using one criminal agreement to prove another criminal agreement. This is exactly the conduct prohibited by the first sentence of 404(b). Nowhere does the Government address the inherent potentiality to prove propensity from this process. Instead, it hides behind the "intent" label,[22] making no effort to address this Court's implicit recognition in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443 and n.20 (1978) that 'intent to agree' is so intimately tied up with the act of agreement itself that it is best addressed in that context.[23]

---

[22] The Government does not explain how the Sixth Circuit's decision can be squared with the rule in several circuits that a mere denial of the act part of the crime raises no genuine issue of intent and therefore bad act testimony is inadmissible. *See* Pet. at 16-19. Its citation to *United States* v. *Park*, 421 U.S. 658 (1975) adds nothing. *Park* did not involve Rule 404(b), much less an issue about 'intent', and in *Park* the defendant had taken the stand in his own defense, unlike the instant case. Nor does the Government's reference to the Petitioners' counsel's peripheral mention to 'mere presence' change the result. For the Sixth Circuit, it was enough that Petitioners denied the agreement. The fact that Petitioners argued that they were merely present is wholly consistent with their main claim of denying the agreement, and the jury here was so instructed. (Trial Tr. 1083). The Government views a 'mere presence' claim as being tantamount to admitting "unlawful conduct" but denying the intent to engage in such conduct. (Br. at 9 and n.9). But it is settled law that mere association with bad actors is neither unlawful nor is it even evidence of a conspiracy, standing alone. *See* American Bar Ass'n Section of Antitrust Law, *Jury Instructions In Antitrust Cases 1964-1976*, at 46, 48, 51, 55-56, 62, 65, 72-73, 75 (1978) (reprint of actual jury instructions in prior cases).

[23] *See* Pet. at 20-22, Amicus Committee Br. 10-12, LaFave and Scott, *Criminal Law* at 464-465 (1972); *United States* v. *Bensinger Co.*, 430 F.2d 584, 594 n.4 (8th Cir. 1970). Contrary to the Government's belief (Br. at n.10), no one here suggests that 'basic intent to agree' has no place in *per se* cases. Instead, it is contended that such intent is not a proper subject on which uncharged bad act

The Government's failure to address the issues simply confirms the need expressed in the Petition and Amicus Committee Brief to review whether, under Rule 404(b), basic intent to agree is an issue on which bad act evidence is admissible and, if so, under what circumstances.

III. THE DENIAL OF PETITIONER VANN'S SIXTH AMENDMENT RIGHT TO CONSULT WITH COUNSEL REQUIRES REVIEW

The Government apparently concedes that Vann has a Sixth Amendment right to consult with his counsel during his appeal and that he could not exercise it. It condones the Sixth Circuit's interference with this right because "the court had no obligation to hear oral argument at all." (Govt. Br. at 12). This is only an attempt to trivialize Constitutional rights. Oral argument had been scheduled before counsel requested a stay based on Vann's comatose condition. Once the state extends a privilege to its citizens, it may not condition the exercise of that privilege to a class of indigent or handicapped persons on their sacrifice of Constitutional rights.[24] Nowhere does the Government explain how it is that criminal prosecutions in district courts cannot go forward when the accused is mentally incapable of consulting with counsel, but that the same Sixth Amendment rights can be shunted aside when the accused is similarly afflicted on appeal.

---

testimony is admissible, at least not where the defense is simply a flat denial of agreement, because such intent follows as a necessary inference from proof of the agreement itself.

[24] *Mayer* v. *City of Chicago*, 404 U.S. 189, 193-194 (1971); *Burns* v. *Ohio*, 360 U.S. 252, 257 (1959) ("Once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty."); *Griffin* v. *Illinois*, 351 U.S. 12, 17-19 (1956).

The Government argues that because Vann's "Sixth Amendment rights were protected fully by his representation throughout the appeal" by his counsel (Govt. Br. at 10), there was no Constitutional violation. This confuses Vann's right to counsel with his right to consult with counsel. Satisfaction of the former does not suffice for compliance with the latter, because (as this Court has recognized) an "assistant, however expert, is still an assistant."[25] No prejudice need be shown when the counsel provision is violated.[26] In any event, Vann could very well have meaningfully contributed to preparation for oral argument, even though the briefs had been filed.[27]

Finally, the Government claims that Vann did not raise the issue in the Sixth Circuit. This is incorrect. The motion papers accompanying the initial request for an extension and the motion papers seeking an extension on the oral argument specifically raised the Constitutional error that would result from proceeding during Vann's incapacity to consult. Any failure to re-raise the Constitutional argument before filing the Reply Brief cannot now bar the Court's consideration of how courts of appeal are to guarantee Sixth Amendment rights when a criminal case appellant becomes comatose during the pendency of his appeal.[28]

---

[25] *Faretta* v. *California*, 422 U.S. 806, 820 (1975).

[26] *Glasser* v. *United States*, 315 U.S. 60, 75 (1942).

[27] Sixth Circuit Rule 7(e) recognizes that oral argument "should undertake to emphasize and clarify the written argument"; it clearly is not intended to be a rehash of the briefs. *See also*, Supreme Court Rule 38.1.

[28] *See* Fed. R. Crim. Proc. 52.

CONCLUSION

For all of the reasons stated above and in the Petition and Amici Briefs, this Court should review the decision of the Sixth Circuit.

Respectfully submitted,

Murray S. Monroe
Counsel of Record for
Petitioner Vann
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

Robert W. Ritchie
Counsel of Record for
Petitioner Melhorn
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661

OF COUNSEL:

William J. Seitz
Taft, Stettinius & Hollister
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

John E. Eldridge
Ritchie, Chadwell & Eldridge
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661

Office-Supreme Court, U.S.
FILED
AUG 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-36

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS P. VANN and
JAMES E. MELHORN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE COMMITTEE OF CRIMINAL ANTITRUST DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

JOHN F. McCLATCHEY
1100 National City Bank Building
Cleveland, Ohio 44114
216 - 566 - 5704

Attorney for Committee of
Criminal Antitrust Defense Counsel

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	page
TABLE OF CASES AND OTHER AUTHORITIES ..	II
INTRODUCTION	1
INTEREST OF THE AMICUS CURIAE	2
SUMMARY OF ARGUMENT	3
REASONS FOR GRANTING THE WRIT	5
I. The Court Should Take Jurisdiction To Settle Important Questions Of Federal Law	5
A. This Court Should Establish Standards For The Exercise Of Discretion Under Rule 404(b)	5
B. This Court Should Define The Proper Relation Of Rule 404(b) And The Issue Of "Intent" In A Per Se Sherman Act Prosecution ..	8
1. The Question Affects A Large Number Of Cases	8
2. The Sixth Circuit's Ruling Permits Admission of Bad Act Testimony In Every Case ..	9
3. The Ruling Authorizes Trial By Propensity	10
4. Evidence Of Uncharged Bad Acts Should Not Be Admitted On The Issue Of Intent In Per Se Sherman Act Cases	10
II. The Sixth Circuit's Decision Conflicts With Decisions in Other Circuits	13
CONCLUSION	14
LIST OF MEMBERS OF THE COMMITTEE	15

TABLE OF CASES AND OTHER AUTHORITIES

I. CASES

page

Boyd v. *United States*, 142 U.S. 450 (1892) 7

Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979) 7

Marshall v. *Lonberger*, 51 U.S.L.W. 4113 (Feb. 22, 1983) 3, 6, 7

Michelson v. *United States*, 335 U.S. 469 (1948) 7

Nash v. *United States*, 229 U.S. 373 (1913) 9

Ohio v. *Roberts*, 448 U.S. 56 (1980) 8

Pillsbury Co. v. *Conboy*, 103 S.Ct. 608 (1983) 7

Trammel v. *United States*, 445 U.S. 40 (1980) 6

United States v. *Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970) 13

United States v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979) ..11, 13

United States v. *Cargo Service Stations, Inc.*, 657 F.2d 676 (5th Cir.) *reh. denied*, 664 F.2d 291 (1981), *cert. denied*, 455 U.S. 1017 (1982) 11

United States v. *Continental Group, Inc.* 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980) .. 11

United States v. *Cooper*, 577 F.2d 1079 (6th Cir.), *cert. denied*, 439 U.S. 868 (1978) 5

United States v. *De Fillipo*, 590 F.2d 1228 (2d Cir.). *cert. denied*, 442 U.S. 920 (1979) 5

United States v. *De John*, 638 F.2d 1048 (7th Cir. 1981) .. 5

United States v. *Dothard*, 666 F.2d 498 (11th Cir. 1982) . 5

United States v. *Gamble*, 541 F.2d 873 (10th Cir. 1976) . 5

page

United States v. *Gillen*, 599 F.2d 541 (3rd Cir.), *cert. denied*, 444 U.S. 866 (1979) 9, 11, 12

United States v. *Gorel*, 622 F.2d 100 (5th Cir.), *cert. denied*, 445 U.S. 943 (1979) 5

United States v. *Green*, 648 F.2d 587 (9th Cir. 1981) 5

United States v. *Griffith*, 334 U.S. 100 (1948) 9

United States v. *Kahan & Lessin Co.*, 695 F.2d 1122 (9th Cir. 1982) 11, 13

United States v. *Koppers Co.*, 652 F.2d 290 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981) 11

United States v. *Manafzadeh*, 592 F.2d 81 (2d Cir. (1979) 5

United States v. *Miroff*, 606 F.2d 777 (7th Cir. 1979) 5

United States v. *Potter*, 616 F.2d 384 (9th Cir.), *cert. denied*, 449 U.S. 832 (1979) 5

United States v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) 7

United States v. *SIGMA*, 624 F.2d 461 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981) 11

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 9

United States v. *United States Gypsum Co.*, 438 U.S. 422 (1978) 4, 8, 10, 11

United States v. *United States Gypsum Co.*, 600 F.2d 414 (3rd Cir.), *cert. denied*, 444 U.S. 884 (1979) 9

United States v. *Woods*, 613 F.2d 629 (6th Cir.), *cert. denied*, 446 U.S. 920 (1980) 5

Upjohn Co. v. *United States*, 449 U.S. 383 (1981) 6, 7

II. STATUTES page

15 U.S.C. §§ 1, 2 (Sherman Act) 9

28 U.S.C. Federal Rules Evidence 404(b) (Other Crimes, Wrongs or Acts) .....passim

III. OTHER AUTHORITIES

La Fave and Scott, *Criminal Law*, § 61 (1972, 4th Repr. 1978) 10, 12

R. Bork, *The Antitrust Paradox* (1978) 9

Reed, "The Development of the Propensity Rule in Federal Criminal Causes, 1840 – 1975," 51 U. Cin. L. Rev. 299 (1982) 7

1970-79 U.S. Antitrust Cases–Summaries ¶ 45,078, 45,079 8

4 C.C.H. Trade Regulation Reporter "U.S. Antitrust Cases–Summaries" ¶ 45,078 – ¶ 45,083 8

2 Weinstein, *Evidence* ¶ 404[08] (1982) 5

22 Wright & Graham, Federal Practice & Procedure § 5239 (1978) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-36

THOMAS P. VANN and
JAMES E. MELHORN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE COMMITTEE OF CRIMINAL ANTITRUST DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

INTRODUCTION

The Committee of Criminal Antitrust Defense Counsel ("Committee") files this Brief as *amicus curiae*, with the consent of all parties, in support of the Petition for a Writ of Certiorari filed by Thomas P. Vann and James E. Melhorn herein.

The Committee's support as *amicus* is limited to the second question presented in the Petition.[1] Petitioners there urge this Court to review the Sixth Circuit's ruling in this fact situation: the indictment charged defendants and others with participating in a *per se* unlawful conspiracy to rig the bids of *two* identified contracts. The Bill of Particulars related only to those two contracts. Following several days of trial, and without prior notice, the prosecution introduced testimony of defendants' alleged participation in *six* other uncharged bid rigging agreements. Both the District Court and the Sixth Circuit interpreted Federal Rule of Evidence 404(b)[2] ("Rule 404(b)") as permitting admission of such testimony on the issue of the defendants' "intent" — the Sixth Circuit on intent to agree and the District Court on intent to effectuate the objective of the conspiracy.

INTEREST OF THE AMICUS CURIAE

The Committee consists of lawyers from 78 law firms that have represented, now represent, and expect in the future to represent defendants in *per se* Sherman Act prosecutions. The issues presented by this case fundamentally affect the rights of Committee members' clients to a fair determination of their guilt or innocence.

The Committee's particular concern is that, under the Sixth Circuit's ruling, entry of a not guilty plea to the charged crime permits the prosecution, without prior notice, to introduce testimony of uncharged crimes at trial. The Sixth Circuit

---

[1] The Committee herein takes no position on the other three questions presented for review by Petitioners

[2] 28 U.S.C. Federal Rules of Evidence 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

held that intent to agree is a separate issue from the act of agreement in a *per se* Sherman Act case, that denial of the act of agreement puts such intent in issue, and that testimony of uncharged crimes is admissible on that issue.

Under that ruling, it is impossible for a defendant to prepare a response to a very damaging attack. The uncertainty created by the ruling affects both the outcome of the trial and the defendant's decision whether to force the prosecution to prove his guilt to the charged crime in the first place.

SUMMARY OF ARGUMENT

This Court should take jurisdiction of this case for the following reasons:

(a) To settle important questions of Federal law, specifically the proper relation of Rule 404(b) to the issue of "intent" in a *per se* Sherman Act prosecution, and the standards to be applied in exercising discretion under Rule 404 (b); and

(b) To resolve a conflict between the Courts of Appeals for the Sixth and other Circuits on whether, in a *per se* Sherman Act prosecution, intent to agree is an issue on which testimony of uncharged bad acts is admissible.

Since the Federal Rules of Evidence became effective in 1975, neither Rule 404(b) nor any of the other evidence rules has explicitly presented an issue for decision by this Court. In *Marshall* v. *Lonberger*, 51 U.S.L.W. 4113 (February 22, 1983), this Court recognized the confusion in the common law of admission of other crimes, wrongs or acts. Lower courts have considered issues under Rule 404(b) in over 800 cases: the rule is the most heavily litigated of all the evidence rules, and there is doubt and uncertainty concerning its meaning and application.

In the five years since this Court's last decision in a criminal antitrust case, *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), over 300 criminal cases alleging *per se* Sherman Act violations by more than 900 defendants have been filed; 52 in the first six months of 1983 alone. In *Gypsum*, while this Court discussed at length the issue of "intent to effectuate objective" of a conspiracy, it mentioned but did not discuss a second type of intent: "basic intent to agree." The Sixth Circuit held in this case that testimony of uncharged bad acts was admissible under Rule 404(b) to show this basic level of intent. The District Court had expressly concluded to the contrary.

The Committee agrees with Petitioners that the Sixth Circuit misinterpreted and misapplied Rule 404(b) in this *per se* bid rigging case and virtually sanctions trial by propensity. That Court's holding makes the trial of a *per se* case uncertain and unpredictable, and directly affects both the ability of Committee members' clients to defend themselves effectively and the advice that Committee members give their clients on whether to stand trial in the first place.

The issue raised by Question 2 of the Petition affects a large number of pending and future *per se* Sherman Act prosecutions, as well as a broad range of other antitrust and non-antitrust cases in which Rule 404(b) is involved. This Court should take jurisdiction to rule on the relationship between Rule 404(b) and the issue of "intent" in a *per se* case, to establish standards for the exercise of discretion under that rule, and to resolve the conflict between the courts of appeals.

REASONS FOR GRANTING THE WRIT

I. This Court Should Take Jurisdiction to Settle Important Questions of Federal Law

A. This Court Should Establish Standards for the Exercise of Discretion under Rule 404(b).

Rule 404(b) is the most heavily litigated of all the evidence rules: as of July 30, 1983, the rule had been cited in 863 district court and court of appeals reported decisions.[3] The rule plays – and will continue to play – an important and often controlling role in a great many other decisions in a broad range of cases where motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident are involved.[4] While the rule establishes a flat prohibition against propensity evidence in the first sentence, it authorizes the exercise of very broad discretion with no substantive guidance whatever in the second.

---

[3] 22Wright & Graham, *Federal Practice & Procedure* § 5239 at 427-428 (1978); 2 Weinstein, Evidence ¶ 404[08] at 404-47 (1982). The 863 case figure is based upon a Lexis study conducted on August 4, 1983.

[4] Motive, *Compare, United States* v. *Gorel*, 622 F.2d 100 (5th Cir.), *cert. denied*, 445 U.S. 943 (1979) *to United States* v. *Potter*, 616 F.2d 384 (9th Cir.), *cert. denied* 449 U.S. 832 (1979); Opportunity, *Compare United States* v. *DeJohn*, 638 F.2d 1048 (7th Cir. 1981) *to United States* v. *Green*, 648 F.2d 587 (9th Cir. 1981); Preparation, *See United States* v. *Gamble*, 541 F.2d 873 (10th Cir. 1976); Plan, *See United States* v. *Dothard*, 666 F.2d 498 (11th Cir. 1982); Knowledge, *Compare United States* v. *Miroff*, 606 F.2d 777 (7th Cir. 1979) *to United States* v. *DeFillipo*, 590 F.2d 1228 (2nd Cir.), *cert. denied*, 442 U.S. 920 (1979); Identity, *Compare* majority dissent, and concurring opinions in *United States* v. *Woods*, 613 F.2d 629 (6th Cir.) *cert. denied*, 446 U.S. 920 (1980); Absence of Mistake or Accident, *Compare United States* v. *Manafzadeh*, 592 F.2d 81 (2nd Cir. 1979) *to United States* v. *Cooper*, 577 F.2d 1079 (6th Cir.), *cert. denied*, 439 U.S. 868 (1978). The cases are in conflict principally over whether evidence is admissible under the exceptions regardless of the extent to which the defense first disputes the issue.

The result of this lack of guidance has been confusion and conflict. As stated at page 24 of the Petition:

> So widespread is the abuse of Federal Rule of Evidence 404(b) that the number of criminal defendants being effectively tried as recidivists is unknowable: 'There is no question of evidence more frequently litigated in the appellate courts than the admission of evidence of other crimes, wrongs, or acts.' As leading commentors recognize (and as shown above), 'despite the recurrence of the issue, the opinions are often poorly reasoned and provide little guidance to trial judges,' the decisions 'often cannot be reconciled'; the drafters of the rule 'chose to leave the law in its messy state'; and the rule itself 'does nothing to clarify the issues, and may in some respects have muddied the waters even more.' (footnotes omitted)

The Federal Rules of Evidence have only been cited by this Court in less than 40 cases since becoming effective in 1975, and neither Rule 404(b) nor any other evidence rule has presented an issue for decision by this Court.[5] Recently, however, in *Marshall* v. *Lonberger*, this Court recognized the general state of confusion in the common law of the admission of other crimes, wrongs or acts. In the majority opinion, Justice Rehnquist stated:

> Justice Stevens' dissent appears to rest on a view that the common law regarded the admission of prior convictions as grossly unfair and subject to some sort of blanket prohibition. In fact, the common law was far more ambivalent. . . . Alongside the general principle that prior convictions are inadmissible . . . the common law developed broad, vaguely defined exceptions – such

---

[5] While certain cases, e.g., *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981) and *Trammel* v. *United States*, 445 U.S. 40 (1979), have dealt with the issue of privilege, Rule 501 expressly leaves development of the law of privilege to the courts and provides no substantive guidance.

> as proof of intent, identity, malice, motive and plan — whose application is left largely to the discretion of the trial judge. . . .[6]

In a dissent joined by Justices Blackmun, Brennan, and Marshall, Justice Stevens stated:

> The common law has long deemed it unfair to argue that because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime . . . The objection to such evidence is not that the proposed inference is illogical. The objection is rather that the inference is so attractive that it will overwhelm the fact finder and create an unwarranted presumption of guilt.[7]

The lower courts, prosecutors and defense counsel are in pressing need of guidance from this Court on the standards governing the exercise of discretion under Rule 404(b). This Court has provided such guidance in other contexts, having addressed the factors to be used in deciding whether a litigant is entitled to grand jury transcripts[8]; the standards by which the federal courts are to interpret questions of attorney-client privilege[9]; the standards by which the district courts are to determine whether a witness's claim of the privilege against self-incrimination is more than fanciful[10] and the

---

[6] *Marshall* v. *Lonberger*, 51 U.S.L.W. 4113, 4118, n. 6 (Feb. 22, 1983). *See generally*, Reed, "The Development of the Propensity Rule in Federal Criminal Causes, 1840-1975", 51 U.Cin.L. Rev. 299 (1982).

[7] *Marshall* v. *Lonberger*, 51 U.S.L.W. at 4120, n. 1 (Stevens, J., dissenting). *See also*, *Michelson* v. *United States*, 335 U.S. 469, 475-476 (1948); *Boyd* v. *United States*, 142 U.S. 450 (1892).

[8] *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958).

[9] *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981).

[10] *Pillsbury Co.* v. *Conboy*, 103 S. Ct. 608 (1983).

rules to be followed in addressing the interplay between Federal and State Rules of Evidence and the Confrontation Clause.[11]

The issues raised by Rule 404(b) are immediate, continuing, important and often critical to guilt or innocence. Following full briefing and argument, this Court should set standards for the exercise of discretion by lower courts under that rule.

B. This Court Should Define The Proper Relation of Rule 404(b) And The Issue of "Intent" In A Per Se Sherman Act Prosecution.

(1) The Question Affects A Large Number of Cases

In the five years[12] since this Court last decided a criminal antitrust case,[13] over 900 individuals, associations and corporations have been prosecuted in 314 criminal actions charging *per se* violations of the Sherman Act.[14] The pace of enforcement has been increasing in the past few years: 57 *per se* Sherman Act prosecutions were filed in 1981, 90 in 1982, and 52 in the first six months of 1983.

Numerous *per se* cases are now in the pre-trial stage, and many more are likely to be filed. In all of these pending and future cases, agreement is the issue, and the evidence admissible on that issue is a critical element both in a defendant's decision to stand trial and in the outcome of the trial itself.

---

[11] *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

[12] July 1, 1978 to June 30, 1983.

[13] *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).

[14] 1970-79 U.S. Antitrust Cases —— CCH Summaries ¶¶ 45,078, 45,079; 4 CCH Trade Reg. Rptr. ¶¶ 45,078, 45,079, 45,080, 45,081, 45,082, 45,083.

(2) The Sixth Circuit's Ruling Permits Admission of Bad Act Testimony in Every Case

The Sixth Circuit upheld admission of testimony of six uncharged, unrelated and allegedly unlawful bid rigging occurrences against Petitioners on the ground that the testimony bore on their "basic intent to agree" to the charged conspiracy.[15] The Circuit Court concluded that such intent was put in issue solely because Petitioners disputed the charge of having agreed: by raising a 'lack of agreement' defense and by developing, through cross-examination of the Government's witnesses, admissions that Petitioners either were merely present or were not present at various meetings with alleged co-conspirators and others.

In *per se* Sherman Act cases, proof of an overt act is unnecessary. The crime is the agreement and lack of agreement is virtually the only defense.[16] By permitting admission of bad act testimony whenever the accused denies having agreed, the Sixth Circuit permits admission of such testimony in every case: the denial of agreement is made by the not guilty plea.

The Sixth Circuit's holding penalizes an antitrust defendant in a *per se* case for pleading not guilty and standing trial, even when he does not dispute the intent issue and does not open up the issue of his good character. Such a holding

---

[15] This case thus does not involve the admission of prior bad acts to show the specific intent element of certain cases under § 2 Sherman Act, 15 U.S.C. § 2, or to show the genesis of a common scheme or plan, or to lay a background for proof of the charged offense.

[16] *United States* v. *United States Gypsum Co.*, 600 F.2d 414, 417 (3rd Cir.) *cert. denied*, 444 U.S. 684 (1979). Accord, *United States* v. *Griffith*, 334 U.S. 100, 105 (1947); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-223, 252 (1940); *Nash* v. *United States*, 229 U.S. 373, 378 (1913); *United States* v. *Gillen*, 599 F.2d 541, 545-546 (3rd Cir.), *cert. denied*, 444 U.S. 866 (1979); R. Bork, *The Antitrust Paradox* 18 (1978).

permits the prosecution to elicit wholesale testimony of prior bad acts with no pretrial notice of its intent to do so.

(3) The Ruling Authorizes Trial By Propensity

The Sixth Circuit's ruling conflicts with the express prohibition contained in Rule 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

The testimony of six uncharged bid-rigging bad acts admitted in this case clearly bore on the propensity of defendants to commit the charged acts. Since the lack of agreement is virtually the sole defense, testimony relating to six other "agreements" could only tend to encourage the jury to find agreement in the seventh, and the Government conceded that that was an essential purpose of the evidence (Pet. App. 21a, 27a). Because the intent exception was not properly applied in this case, the admission of testimony of uncharged bad acts violated Rule 404(b)'s prohibition against propensity evidence.

(4) Evidence of Uncharged Bad Acts Should Not Be Admitted On The Issue Of Intent In Per Se Sherman Act Cases

This Court has identified two types of intent in Sherman Act cases. In *Gypsum*, relying on pp. 464-465 of W. LaFave and A. Scott's leading treatise,[17] this Court explained that:

> In a conspiracy, two different types of intent are generally required – *the basic intent to agree,* which is necessary to establish the existence of the conspiracy, *and the more traditional intent to effectuate the object*

[17] *LaFave & Scott,* Criminal Law (1972).

> *of the conspiracy. . . . Our discussion here focuses only on the second type of intent.* (emphasis added)[18]

As to "intent to achieve objective", each of the courts of appeals to consider the question has held that it is *not* an issue in a *per se* case.[19] This Court has declined to review every decision in which certiorari was sought. The Sixth Circuit in this case declined to follow the District Court's ruling that permitted admission of bad act testimony on the issue of "intent to effectuate objective." Unless and until this Court decides otherwise, "intent to effectuate objective" will not be an issue in *per se* Sherman Act cases, and an exception to Rule 404(b) for evidence of such intent cannot serve as a basis for admitting bad testimony.

Similarly it is submitted the basic intent to agree should not be a basis on which to introduce 404(b) evidence and in so doing the Sixth Circuit was in error. As Messrs. LaFave and Scott point out, intent to agree is virtually indistinguishable from the offense of agreement itself:

> Every conspiracy involves an agreement, so it must be established that the several parties intended to agree. But such an intent is 'without moral content' . . . . *The intent to agree is so intimately tied up with the*

---

[18] *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443 n.20)1978).

[19] *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122, 1125 (9th Cir. 1982); *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 681-683 (5th Cir.), *reh. denied*, 664 F.2d 291 (1981), *cert. denied*, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 295-296 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *SIGMA*, 624 F.2d 461, 465 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-462 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States* v. *Gillen*, 599 F.2d 541, 544-546 (3rd Cir.,), *cert. denied*, 444 U.S. 866 (1979); *United States* v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979).

> *agreement (the act part of the crime) that it is best dealt with in that context. Indeed, it may even be said that such intent is not really part of the mens rea of the conspiracy.*[20]

Moreover, intent to agree is necessarily proven by proof of the agreement itself.[21] In a *per se* antitrust case, the intent to agree is so inextricably intertwined with the act part of the crime that admitting bad acts to show this type of intent is the equivalent of admitting prior crimes to show propensity.[22]

The questions requiring ruling by this Court are whether basic intent to agree is a separate issue from the act of agreement; if so, the acts of defendant – e.g., not guilty plea, argument before or at trial, defense evidence on lack of intent – that permit the admission of bad act testimony on that issue; and the standards to be applied in exercising discretion in admitting such testimony.

Until these questions are resolved, trial of a *per se* case will be a game played with dice loaded in the prosecution's favor.

---

[20] W. LaFave & A. Scott, *Criminal Law*, § 61 at 464 (1972, 4th Repr. 1978).

[21] *See* Petitioners' Petition at 21-22 and notes thereto; *United States* v. *Gillen*, 599 F.2d at 545 ("No inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy").

[22] The District Court held, for this reason, that the testimony was not admissible on the issue of "intent to agree." Pet. p. 5, Pet. App. 21a, 28a-29a.

II. The Sixth Circuit's Decision Conflicts With Decisions In Other Circuits

The Sixth Circuit's decision that bad acts are admissible to show intent in a *per se* antitrust case is squarely at odds with the Eighth Circuit's decision in *United States* v. *Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970). In that case, it was held that testimony of other conspiracies was inadmissible in a *per se* antitrust case because

> intent was not an issue in the case. The act of price rigging in interstate commerce was a *per se* violation of the Act and intent would be immaterial. (430 F.2d at 594 n.4).

The Sixth Circuit's decision also at least implicitly conflicts with recent antitrust decisions in the Seventh and Ninth Circuits. In *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1108-1109 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979), attorneys for the Government asked a witness in a bid rigging case about other conspiratorial activity ostensibly to elicit evidence about the accused's knowledge and intent as to the offense charged. The District Court struck the question as prejudicial and the Seventh Circuit agreed that this was sufficient to avoid prejudice. In *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982), the Government inquired of a witness as to defendant's involvement in a related treble damage suit. The District Court directed the jury to disregard the question and answer. The Court of Appeals held that this was sufficient to avoid the prejudice.

CONCLUSION

For all the reasons herein given, and the reasons stated in the Petitioners' Petition, the Committee urges this Court to review the Sixth Circuit's judgment and opinion in this case.

Respectfully submitted,

.....

John F. McClatchey
Attorney for the Committee of
Criminal Antitrust Defense Counsel

Thompson, Hine and Flory
1100 National City Bank Building
Cleveland, OH 44114
(216) 566-5704

COMMITTEE OF CRIMINAL ANTITRUST DEFENSE COUNSEL MEMBERS

Alan S. Ward, Esq.
Baker & Hostetler
818 Connecticut Avenue, N.W.
Washington, DC 20006

Charles I. Thompson, Jr., Esq.
Ballard, Spahr, Andrews & Ingersoll
30 South 17th Street
Philadelphia, PA 19103

Robert W. DeVos, Jr., Esq.
Bergson, Borkland, Margolis & Adler
11 DuPont Circle, N.W.
Washington, DC 20036

Peter D. Byrnes, Esq.
Bogle & Gates
The Bank of California Center
Seattle, WA 98164

Hubert Humphrey, Esq.
Brooks, Pierce, McLendon, Humphrey & Leonard
Suite 1400
Wachovia Bldg.
201 North Elm Street
Greensboro, NC 27401

Kenneth J. Tuggle, Esq.
Brown, Todd & Heyburn
Citizens Plaza
Louisville, KY 40202

James I. Serota, Esq.
Cabell, Kennedy & French
220 East 42nd Street
New York, NY 10017

George D. Reycraft, Esq.
Cadwalader, Wickersham & Taft
One Wall Street
New York, NY 10005

Dennis McInerney, Esq.
Cahill, Gordon & Reindel
80 Pine Street
New York, NY 10005

John D. Leech, Esq.
Calfee, Halter & Griswold
1800 Central National Bank Building
Cleveland, OH 44114

Paul H. LaRue, Esq.
Chadwell & Kayser, Ltd.
8500 Sears Tower
233 South Wacker Drive
Chicago, IL 60606

Harry McCall, Jr., Esq.
Chaffe, McCall, Phillips, Toler & Sarpy
1500 First National Bank of Commerce Building
New Orleans, LA 70112-1790

Charles D. Mahaffie, Jr., Esq.
Cleary, Gottlieb, Steen & Hamilton
1752 N Street, N.W.
Washington, DC 20036

Peter E. Fleming, Jr., Esq.
Curtis, Mallet-Prevost, Colt & Mosle
101 Park Avenue
New York, NY 10178

Robert W. Gettleman, Esq.
D'Ancona & Pflaum
30 No. LaSalle Street
Chicago, IL 60602

Charles Donelan, Esq.
Day, Berry & Howard
One Post Office Square
Boston, MA 02109

Richard G. Schneider, Esq.
Dechert, Price & Rhoads
3400 Center Square Street
Philadelphia, PA 19102

Barry Wm. Levine, Esq.
Dickstein, Shapiro & Morin
2101 L St., N.W.
Washington, DC 20037

Kenneth E. Newman, Esq.
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
New York, NY 10112

Michael E. Bress, Esq.
Peter S. Hendrixson, Esq.
Dorsey & Whitney
2200 First Bank Place East
Minneapolis, MN 55402

Frederick Lippitt, Esq.
Edwards & Angell
One Hospital Trust Plaza
Providence, RI 02903

John D. French, Esq.
Faegre & Benson
2300 Multifoods Tower
Minneapolis, MN 55402

Richard N. Carrell, Esq.
Fulbright & Jaworski
Suite 800, Bank of the Southwest Bldg.
Houston, Texas 77002

Michael M. Briley, Esq.
Fuller & Henry
1200 Edison Plaza
300 Madison Avenue
Toledo, OH 43603

Curtis L. Frisbie, Jr., Esq.
Gardere & Wynne
1500 Diamond Shamrock Tower
Dallas, TX 75201

Robert J. Rotatori, Esq.
Gold, Rotatori, Schwartz & Gibbons
1100 Ohio Savings Plaza
1801 East Ninth Street
Cleveland, OH 44114

Stanley M. Fisher, Esq.
Guren, Merritt, Feibel, Sogg & Cohen
700 Terminal Tower
Cleveland, OH 44113

Steven P. Handler, Esq.
Hannafan & Handler, Ltd.
Suite 1880
Three First National Plaza
Chicago, IL 60602

Thomas B. Leary, Esq.
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, DC 20006

Mark Crane, Esq.
Hopkins & Sutter
Three First National Plaza
52nd Floor
Chicago, IL 60602

John E. Jenkins, Jr., Esq.
Jenkins, Fenstermaker, Krieger, Kayes & Farrell
11th Floor Coal Exchange Bldg.
Huntington, WV 25716

Carl L. Steinhouse, Esq.
Jones, Day, Reavis & Pogue
1700 Union Commerce Bldg.
Cleveland, OH 44115

A. Stewart Kerr, Esq.
Kerr, Russell and Weber
2100 Detroit Bank and Trust Building
Detroit, MI 48226

H. Richard Wachtel, Esq.
LaBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, NY 10005

H. Steven Wilson, Esq.
Latham & Watkins
555 South Flower Street
Los Angeles, CA 90071

Charles Kohlmeyer, Jr., Esq.
Lemle, Kelleher, Kohlmeyer & Matthews
21st Floor Pan American Life Center
601 Poydras Street
New Orleans, LA 70130

Lawrence R. Levin, Esq.
Levin & Funkhouser, Ltd.
Xerox Center
Suite 2410
55 W. Monroe St.
Chicago, IL 60603

Robert S. Allen, Esq.
Lewis, Rice, Tucker, Allen and Chubb
1400 Railway Exchange Bldg.
611 Olive Street
St. Louis, MO 63101

Stanley E. Neely, Esq.
Locke, Purnell, Boren, Laney & Neely
36th Floor
Republic Bank Tower
Dallas, TX 75201

Richard K. Decker, Esq.
Lord, Bissell & Brook
Suites 3200-3500
Harris Bank Building
115 South LaSalle Street
Chicago, IL 60603

Gordon B. Spivack, Esq.
Lord, Day & Lord
25 Broadway
New York, NY 10004

Richard M. Kerger, Esq.
Marshall & Melhorn
14th Floor National Bank Building
Toledo, OH 43604

Patrick W. O'Brien, Esq.
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, IL 60604

James C. Roberts, Esq.
Mays, Valentine, Davenport & Moore
F & M Center
1111 E. Main Street
Richmond, VA 23219

J. Thomas Rosch, Esq.
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, CA 94111

Stephen W. Armstrong, Esq.
Montgomery, McCracken, Walker & Rhoads
Twentieth Floor
Three Parkway
Philadelphia, PA 19102

John R. Ferguson, Esq.
Peabody, Lambert & Meyers
1150 Connecticut Ave., N.W.
Washington, DC 20036

Norwood Robinson, Esq.
Petree, Stockton, Robinson, Vaughn, Glaze & Maready
1001 West Fourth Street
Winston-Salem, NC 27101

William Miller, Esq.
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, CA 94120

Walker B. Comegys, Esq.
Powers & Hall, Professional Corporation
100 Franklin Street
Boston, MA 02110

Allan J. Reniche, Esq.
Reniche & Krause
1010 Second Avenue
Suite 1521
San Diego, CA 92101

Roger A. Clark, Esq.
Rogers & Wells
1737 H Street, N.W.
Washington, DC 20006

Howard K. Fuguet, Esq.
Ropes & Gray
225 Franklin Street
Boston, MA 02110

Richard J. Rappaport, Esq.
Jeffrey M. Cross, Esq.
Ross & Hardies
One IBM Plaza
Chicago, IL 60611

W. Donald McSweeney, Esq.
Schiff, Hardin & Waite
7200 Sears Tower
233 South Wacker Drive
Chicago, IL 60606

Edward W. Mullinix, Esq.
Schnader, Harrison, Segal & Lewis
1719 Packard Bldg.
Philadelphia, PA 19102

Jesse Climenko, Esq.
Shea & Gould
330 Madison Avenue
New York, NY 10017

James T. Halverson, Esq.
Shearman & Sterling
53 Wall Street
New York, New York 10005

Don T. Hibner, Jr., Esq.
Sheppard, Mullin, Richter & Hampton
48th Floor
333 South Hope Street
Los Angeles, CA 90071

George E. Leonard, Esq.
Shughart, Thomson & Kilroy
9th Floor Commerce Bank Building
922 Walnut Street
Kansas City, MO 64199

Bynum M. Hunter, Esq.
Smith Moore Smith Schell & Hunter
500 NCNB Building
P. O. Box 21927
Greensboro, NC 27420

Earl E. Pollock, Esq.
Sonnenschein Carlin Nath & Rosenthal
Suite 8000
Sears Tower
233 South Wacker Drive
Chicago, IL 60606

George I. Meisel, Esq.
Squire, Sanders & Dempsey
1800 Huntington Building
Cleveland, OH 44115

Richard A. Whiting, Esq.
Steptoe & Johnson Chartered
1250 Connecticut Avenue, N.W.
Washington, DC 20036

Harold B. Stone, Esq.
Stone & Hinds, P.C.
700 Park Bank Tower
507 Gay St., S.W.
Knoxville, TN 37902

Wilson Warren Herndon, Esq.
Strasburger & Price
1200 One Main Place
Dallas, TX 75202

John F. McClatchey, Esq.
Thompson, Hine and Flory
1100 National City Bank Bldg.
Cleveland, OH 44114

Bruce F. Thompson, Esq.
Thompson, Nielsen, Klaverkamp & James
4444 IDS Center
80 South 8th Street
Minneapolis, MN 55402

William M. Wycoff, Esq.
Thorp, Reed & Armstrong
One Riverfront Center
Pittsburgh, PA 15222

Harry Kemker, Esq.
Trenam, Simmons, Kemker, Scharf, Barkin, Frye, & O'Neill
2600 First Florida Tower
P.O. Box 1102
Tampa, FL 33601

Dennis McCarthy, Esq.
VanCott, Bagley, Cornwall & McCarthy
Suite 1600
50 South Main Street
Salt Lake City, UT 84144

Harry M. Reasoner, Esq.
Vinson & Elkins
First City Tower
Houston, TX 77002

James P. Kennedy, Esq.
Vorys, Sater, Seymour and Pease
52 East Gay Street
Columbus, OH 43215

William J. Speers, Jr., Esq.
Warner & Stackpole
28 State Street
Boston, MA 02109

Louis Paisley, Esq.
Weston, Hurd, Fallon, Paisley
& Howley
2500 Terminal Tower
Cleveland, OH 44113

Douglas R. Carlson, Esq. of
Wildman, Harrold, Allen
& Dixon
Suite 3000
One IBM Plaza
Chicago, IL 60611

David L. Foster, Esq.
Wilkie Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, NY 10022

William B. Poff, Esq.
Woods, Rogers, Muse, Walker
& Thornton
105 Franklin Road, S.W.
Roanoke, VA 24004

Office - Supreme Court
FILED
AUG 11 1983
ALEXANDER L. STEVAS,
CLERK

CORRECTED COPY

No. 83-36

In the Supreme Court of the United States

October Term, 1982

THOMAS P. VANN and JAMES E. MELHORN,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of The National Association of Criminal Defense Lawyers As Amicus Curiae in Support of Petitioners

Ephraim Margolin
Counsel of Record for
The National Association of
Criminal Defense Lawyers
240 Stockton Street, 3rd Floor
San Francisco, CA 94108
Telephone No. 415 421-4347

RENAISSANCE PRINTING, INC., 76 W. ADAMS
8TH FLOOR, DETROIT, MICHIGAN 48226 — (313) 964-3185

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

QUESTION PRESENTED 1

INTEREST OF AMICUS CURIAE 1

SUMMARY OF PROCEEDINGS 2

SUMMARY OF ARGUMENT 4

REASON FOR GRANTING THE WRIT OF CERTIORARI

The Sixth Circuit's failure to examine whether the government at trial had proven the unavailability of the makers of incriminating extrajudicial statements before these hearsay declarations were admitted under Federal Rule of Evidence 801(d)(2)(E) prevented vindication of petitioners' constitutional right to confront the witnesses against them 5

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

UNITED STATES CONSTITUTION

Sixth Amendment 1-14

CASES

Alford v. United States, 282 U.S. 687 (1931) 10

Barber v. Page,
390 U.S. 719 (1968) 11

California v. Green,
399 U.S. 149 (1970) 6, 9, 11

Dutton v. Evans,
400 U.S. 74 (1970) 6, 7, 12

Kirby v. United States,
174 U.S. 47 (1899) 9, 10

Lutwak v. United States,
344 U.S. 604 (1953) 7

Mattox v. United States,
156 U.S. 237 (1895) 10

Motes v. United States,
178 U.S. 458 (1900) 11

Ohio v. Roberts,
448 U.S. 56 (1980) 3, 4, 5, 6, 7, 9, 10, 12, 13

Ottomano v. United States,
468 F.2d 269 (1st Cir. 1972) 8

Pointer v. Texas,
380 U.S. 400 (1965) 10

Reynolds v. United States,
98 U.S. 145 (1879) 10

United States v. Gibbs,
703 F.2d 683 (3rd Cir. 1983) 13

United States v. Gooding,
245 U.S. (12 Wheat.) 460 (1827) 6, 7

United States v. Papia,
560 F. 2d 827 (7th Cir. 1977) 8

United States v. Peacock,
654 F.2d 339 (5th Cir. 1981) 2

United States v. Perez,
658 F.2d 654 (9th Cir. 1981) 2

STATUTES

Federal Rule of Evidence 801(d)(2)(E) 2, 4, 5, 8, 13

OTHER AUTHORITIES

Advisory Committee Note, Federal Rule of Evidence 801(d)(2)(E) 8

C. McCormick, Evidence (2d ed. 1972) 8

Morgan, *The Rationale of Vicarious Admissions*, 42 Harv. L. Rev. 461 (1929) 8

Report, New Jersey Supreme Court, Committee on Evidence (1963) 8

QUESTION PRESENTED

Did the government's proving the necessary elements of a conspiracy charge with hearsay statements of absent co-conspirators without first establishing these declarants' unavailability violate the Confrontation Clause of the Sixth Amendment?

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers was founded a quarter of a century ago to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the field of criminal defense practice, to promote proper administration of criminal justice, and to encourage the integrity, independence, and expertise of the criminal defense practitioner. The members of the Association are criminal defense lawyers who devote the major portions of their professional lives to defending persons accused of crimes.

The primary interest of the membership of the Association is to ensure that fundamental rights are recognized and afforded all persons. Conspiracy cases, of course, invariably present serious threats to these fundamental rights. At petitioners' trial, for example, the district court admitted into evidence uncross-examined co-conspirator statements necessary to prove the government's case.

Because co-conspirator hearsay is often unreliable, the opportunity to cross-examine declarants guaranteed by the Sixth Amendment's Confrontation Clause is necessary to prevent unjust convictions. Lately, however, many courts have countenanced prosecutorial circumvention of Sixth Amendment restrictions imposed by this Court on the use of these

often untrustworthy declarations. *E.g., United States v. Perez,* 658 F. 2d 654 (9th Cir. 1981); *United States v. Peacock,* 654 F. 2d 339 (5th Cir. 1981). Unfortunately, the Sixth Circuit's lackadaisical treatment of petitioners' confrontation contention continues this tendency.

The National Association of Criminal Defense Lawyers therefore offers this brief in support of the petition for a writ of certiorari and humbly urges the Court to restore the Confrontation Clause as a shield against unfair convictions by squarely holding that evidence admissible under Federal Rule of Evidence 801(d)(2)(E) may not be introduced unless the prosecutor either produces the declarant or proves his unavailability.

Counsel for both parties have given their consent to the filing of this Amicus Curiae brief. Their letters of consent are on file with the Court.

SUMMARY OF PROCEEDINGS

I. In the District Court.

The government charged that defendants Vann and Melhorn participated in a Sherman Act conspiracy comprised of ten sub-agreements. To prove four of these sub-agreements, the government sought to introduce under Federal Rule of Evidence 801(d)(2)(E) through the testimony of alleged co-conspirator Fugate the out-of-court statements of two other alleged co-conspirators, Pendleton and Malone. Because the government did not present any proof of Pendleton's and Malone's unavailability, defendants, asserting that the admission of this key testimony would violate their Sixth Amendment right to confront the witnesses against them, objected to its admission.

The district court, however, ruled that out-of-court declarations admissible under Rule 801(d)(2)(E) automatically satisfy the requirements of the Confrontation Clause and

overruled the objection. As a result, defendants Vann and Melhorn were unable to cross-examine Malone and Pendleton about the truth of these incriminating statements.

II. In the Court of Appeals for the Sixth Circuit.

Relying on *Ohio v. Roberts*, 448 U.S. 56 (1980), defendants contended in the Court of Appeals for the Sixth Circuit that the district court's refusal to require the government to show that Malone and Pendleton could not be produced for trial violated their constitutional right to confront their accusers. Without mentioning *Roberts* or any other Supreme Court case, the Sixth Circuit cited, but did not analyze, a spray of Court of Appeals cases and smugly observed that

> [w]e need not intimate a view on whether the admission of evidence under Fed. R. Evid. 801(d)(2)(E) raises confrontation clause problems. Whether applying the rule that evidence admitted under the federal co-conspirator exception automatically complies with the requirements of the confrontation clause, or the rule that the declarant must be unavailable, unless the evidence is neither crucial to the prosecution nor devastating to the defendant, the testimony in dispute is admissible.

Order in United States v. Melhorn (82-5384) and Vann (82-5385). *See* Petitioners' Brief at 8a.

III. In the Supreme Court.

The defendants now have petitioned this Court to consider, inter alia, their assertion that the Sixth Circuit erred in failing to require the government to comply with the requirement established by this Court that the prosecution must either produce, or demonstrate the unavailability of, the makers of accusatory statements it seeks to introduce against defendants.

Because the Sixth Circuit's decision strips away the confrontation protection forged by this Court, the National Association of Criminal Defense Lawyers, as amicus curiae, presents this brief in support of petitioners Vann and Melhorn.

SUMMARY OF ARGUMENT

The district court's failure to require the government to produce the declarants of incriminating hearsay admitted under Federal Rule of Evidence 801(d)(2)(E) or to prove their unavailability violated petitioners' Sixth Amendment right to confront the witnesses against them.

The Sixth Circuit's affirmance, based either on the "rule" that evidence admissible under Rule 801(d)(2)(E) automatically complies with the Confrontation Clause or the "rule" that the Confrontation Clause requires a prosecutor to demonstrate the unavailability of a hearsay declarant before introducing out-of-court statements only when the statements are "crucial to the prosecution" or "devastating to the defendant" is clearly inconsistent with this Court's Confrontation Clause decisions, *e.g.*, *Ohio v. Roberts*, 448 U.S. 56 (1980), which demand production of the declarants, proof of their unavailability, or a demonstration of the remoteness of the utility of the declarants' cross-examination as a condition to the admission of the hearsay.

Because the government refused to comply with any of these requirements, petitioners' rights under the Confrontation Clause were violated, and the decision of the Sixth Circuit affirming the convictions should be reversed.

REASON FOR GRANTING THE WRIT OF CERTIORARI

THE SIXTH CIRCUIT'S FAILURE TO EXAMINE WHETHER THE GOVERNMENT AT TRIAL HAD PROVEN THE UNAVAILABILITY OF THE MAKERS OF INCRIMINATING EXTRAJUDICIAL STATEMENTS BEFORE THESE HEARSAY DECLARATIONS WERE ADMITTED UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)(E) PREVENTED VINDICATION OF PETITIONERS' CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST THEM.

I. Introduction.

In rejecting appellants' contention that the district court's refusal to require a showing of Malone and Pendleton's unavailability violated their confrontation rights, the Court of Appeals, without specifying one particular basis for its decision, noted that its refusal to require a showing of Pendleton's unavailability could be bottomed on either the rule that Rule 801(d)(2)(E) statements automatically satisfy the Confrontation Clause or the rule that the declarant must be proven unavailable only when the evidence is crucial to the prosecution or devastating to the defendant. Because neither of these principles has been approved by this Court and because the Court of Appeals failed to apply the rule of necessity consistently relied upon by the Court and clearly explained in *Ohio v. Roberts*, 448 U.S. 56 (1980), the petition for a writ of certiorari should be granted and the Court of Appeals' decision reversed.

II. This Court has never suggested that evidence admissible under Federal Rule of Evidence 801(d)(2)(E) automatically satisfies Confrontation Clause requirements.

The Supreme Court clearly has never endorsed the rule put forth by the Court of Appeals that evidence admissible under

Federal Rule of Evidence 801(d)(2)(E), the federal co-conspirator hearsay "exception" rooted in common law, *e.g.*, *United States v. Gooding*, 245 U.S. (12 Wheat.) 460, 469-70 (1827), automatically complies with the requirements of the Confrontation Clause. Instead, the Court has emphasized that admissibility under a hearsay exception does not guarantee conformance with the Confrontation Clause. As the Court in *California v. Green*, 399 U.S. 149, 155 (1970), explained,

> [w]hile it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence . . . .

And after noting that the hearsay rule and the Confrontation Clause stemmed from the same roots, the Court in *Dutton v. Evans*, 400 U.S. 74, 86 (1970), cautioned that the two evidentiary shields required separate analyses of extrajudicial declarations: "But this Court has never equated the two, and we decline to do so now."

Furthermore, the Court in *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980), emphasized that the range of *all* admissible hearsay was restricted by the Confrontation Clause. First, the Court ruled, the prosecution must produce or prove the unavailability of a hearsay declarant whose statement it seeks to introduce against the defendant. Second, once the declarant is proven unavailable, the prosecution must show that the declaration is reliable. Although the Court did note that the reliability requirement would be satisfied by most hearsay admissible under the dying declaration, cross-examined prior-trial testimony, and business and public

records exceptions, it did not state that co-conspirator hearsay would be entitled to any such presumption of reliability or compliance with the Confrontation Clause. *Id.* at 66, n. 8 and accompanying text.

The *Roberts* Court's concern that exempting co-conspirator statements from independent Confrontation Clause scrutiny would frustrate one of the Clause's purposes, the "advance[ment of] a practical concern for the accuracy of the truth-determining process in criminal trials," *Dutton v. Evans*, *supra*, at 89, was clearly evident in *Dutton*, in which the Court, far from deciding that evidence admitted under a co-conspirator exception automatically fulfilled Confrontation Clause requirements, subjected a statement admitted under a co-conspirator exception to a rigorous examination under the Confrontation Clause before holding that the statement's introduction did not violate the defendant's Sixth Amendment rights. Indeed, instead of indicating that constitutional inquiry could be in any way relaxed because the hearsay was admissible under a co-conspirator exception, the Court held that the defendant's confrontation rights had not been violated only because the testimony "was of peripheral significance at most" and the possibility that the particular hearsay statement could have been proven unreliable was "wholly unreal." *Dutton*, *supra*, at 87, 89.

The Court's fear that co-conspirator hearsay is far too untrustworthy to escape stringent Confrontation Clause scrutiny is justified. Co-conspirator hearsay is permitted under "the theory that the declarant is the agent of the [defendant]. *Lutwak v. United States*, 344 U.S. 604, 617 (1953); *accord*, *United States v. Gooding*, *supra*, at 468-70. That this theory does not assure reliable evidence was recognized by Professor Morgan, who noted that the application of the agency theory to conspiracy cases produces "bizarre interpretations." Morgan,

The Rationale of Vicarious Admissions, 42 HARV. L. REV. 461, 481 (1929). Even the Advisory Committee Note to Federal Rule of Evidence 801(d)(2)(E) acknowledges that the "agency theory of conspiracy is at best a fiction," and Professor McCormick observed that

> doubts raised by conspiracy prosecutions in principle and by the tenuous character of the agency concept in this context have led to rejection of [the exception's] extension ....

C. MCCORMICK, EVIDENCE 646, n. 28 (2d ed. 1972).

As a New Jersey Supreme Court committee on evidence noted,

> [t]o admit the hearsay statements of a co-conspirator merely because of a highly controversial belief that they are more likely to be true than not is insufficient. Many of those who have closely studied the problem of conspiracy are in agreement that such evidence is highly unreliable; the hearsay statements of alleged co-conspirators are perhaps the most suspect of all. To permit criminal convictions to be based on such evidence would be unfair and impractical.

Report, New Jersey Supreme Court, Committee on Evidence 167 (1963).

Because of the unreliability of co-conspirator declarations, application of the automatic compliance rule by the Sixth Circuit and other Courts of Appeals, *see, e.g., United States v. Papia*, 560 F.2d 827, 836, n. 3 (7th Cir. 1977); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972), is disturbing. To lessen the danger of unfair convictions based on uncross-examined co-conspirator declarations, this Court should make express its implicit rejection of the automatic compliance rule by reversing the decision of the court below.

III. The rule that the prosecution must either produce or prove the unavailability of the declarant is not limited to crucial or devastating testimony.

Noting the "Framers' preference for face-to-face accusation" and the Confrontation Clause's "underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence," the court in *Ohio v. Roberts*, *supra*, at 65, declared:

> [T]he Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The Court then explained that the "usual case" included all cases except those in which "the utility of trial confrontation [is] . . . remote." *Id.* at 65, n. 7. Therefore, it very clearly did not limit the rule of necessity to crucial or devastating evidence but created a very limited exception under which proof of unavailability will be excused only upon a clear showing by the prosecution of the futility of cross-examination. The Court's recognition of the value of cross-examination strongly suggests that the invocation by prosecutors of the exception should be rarely permitted:

> [Cross-examination is] a right deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the Constitutions of most, if not of all, the states composing the Union.

Kirby v. United States, 174 U.S. 47, 56 (1899); *see California v. Green*, 399 U.S. 149, 158 (1970) (cross-examination is the "'greatest legal engine ever invented for the discovery of

truth'''); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (cross-examination is a "necessity" for protection of defendants in criminal cases); *Alford v. United States*, 282 U.S. 687, 692 (1931) (cross-examination is "essential to a fair trial").

Moreover, this Court's pre-*Roberts* holdings reveal that a strong necessity rule is indispensable to the viability of the Confrontation Clause. In *Mattox v. United States*, 156 U.S. 237, 242 (1895), the Court explained the need for in-court cross-examination:

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as was sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

As the Court in *Ohio v. Roberts*, *supra*, was to do later, the *Mattox* Court then emphasized that the prosecution's duty to produce the witness would be excused only by "the necessities of the case" and consequently held that the prior trial testimony of a deceased witness, like dying declarations, could be admitted without violating defendant's confrontation rights. *Mattox*, *supra* at 243.

In *Reynolds v. United States*, 98 U.S. 145 (1879), the Court upheld the government's introduction of prior trial testimony only because the defendant was responsible for the declarant's unavailability at trial. In *Kirby v. United States*, 174 U.S. 47, 61 (1899), the Court reversed defendant's convictions because the admission of hearsay evidence in Kirby's trial, unlike dying declarations, did not "arise from the necessity of the

case." Likewise, the Court in *Motes v. United States*, 178 U.S. 458, 471 (1900), held error the admission of cross-examined preliminary examination testimony even though the declarant was not present during trial because the absence "was manifestly due to the negligence of the officers of the Government."

More recently, the Court reversed defendant's conviction in *Barber v. Page*, 390 U.S. 719 (1968), because the trial court had permitted the State of Oklahoma to introduce preliminary hearing testimony without making a good faith effort to produce the declarant. In *California v. Green*, *supra*, at 166-70 (1970), the Court again relied upon the rule of necessity to hold permissible the introduction of preliminary hearing testimony of a witness present at trial but assertedly unable to recall events inculpating the defendant:

> If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing — the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State.
>
> . . .
>
> As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the witness; it produced Porter at trial, swore him as a witness, and tendered him for cross-examination.

This Court's disposition of Confrontation Clause cases, therefore, has turned on whether the prosecution has complied with a tightly construed rule of necessity that has permitted the introduction of hearsay only when the prosecutor has proven the declarant to be unavailable. None of these decisions limit

the rule's application to devastating or crucial evidence, and as *Ohio v. Roberts*, *supra*, makes explicit, no such restriction upon the rule has ever been intended by this Court.

The Sixth Circuit's erroneous limitation of the rule of necessity is apparently based on a declaration in *Dutton v. Evans*, *supra*, at 87, that "[t]his case does not involve evidence in any sense 'crucial' or 'devastating.'" Although the Court was distinguishing the facts in *Dutton* from other cases in which the Court had required a demonstration of the unavailability of the maker of a hearsay statement, the Court clearly did not intend to eviscerate its often issued command that the prosecution must either produce or demonstrate the unavailability of the makers of incriminating hearsay statements. Instead, as later made plain in *Ohio v. Roberts*, *supra*, the holding in *Dutton* recognized a narrow exception to the unavailability requirement: when the utility of trial confrontation is remote, the prosecution may introduce hearsay without infringing upon a defendant's confrontation rights. *Roberts*, *supra*, at 65, n. 7. In *Dutton*, this remoteness was a product of the "peripheral significance at most" of the hearsay statement, *id.* at 87; the effectiveness of a cross-examination that "casts serious doubt on Shaw's [the witness who claimed to hear the out-of-court statement] credibility and, more particularly, on whether the conversation which Shaw related ever took place," *id.* at 88, n. 18; and the "wholly unreal" possibility that cross-examination could have shown the hearsay statement to be unreliable. *Id.* at 89.

The Court in *Dutton*, then, in no way weakened the confrontation protection it had fashioned for defendants in earlier decisions by limiting the rule of necessity to crucial or devastating hearsay evidence. Instead, the Court simply stated the obvious corollary to the availability rule: when the government proves that cross-examination of the maker of an

out-of-court statement would clearly be fruitless, it is excused from producing the declarant or proving his or her unavailability.

IV. The Third Circuit's holding in *United States v. Gibbs* is a correct application of the availability rule to Federal Rule of Evidence 801(d)(2)(E) declarations.

Faced with the issue of whether the government had to comply with the availability rule before introducing co-conspirator hearsay admissible under Federal Rule of Evidence 801(d)(2)(E), the Third Circuit in *United States v. Gibbs*, 703 F.2d 683 (3rd Cir. 1983), carefully adhering to this Court's holdings and applying the remoteness-of-cross-examination test set forth in *Ohio v. Roberts, supra,* flatly rejected the government's contention that a showing of unavailability was not required when the extrajudicial declarations satisfied Rule 801(d)(2)(E) and reversed defendant's conviction because the government "has not carried its burden" of proving "that the hearsay is sufficiently reliable and insignificant to justify dispensing with a showing of unavailability." *Id.* at 693, 694.

This sound decision illustrates the need for reversal of the Sixth Circuit's holding in the present case. As in *Gibbs*, the prosecutor refused even to attempt to justify his failure to demonstrate the unavailability of the declarants, Pendleton and Malone. Also as in *Gibbs*, justification would have been impossible. Because the admitted co-conspirator testimony was necessary to prove four of the ten sub-agreements alleged by the government to comprise the conspiracy, the testimony was clearly of greater than "peripheral significance at most" and the utility of cross-examination therefore not remote. Consequently, under *Gibbs* and the pertinent Supreme Court holdings on which it is based, reversal of the Sixth Circuit's decision is required.

CONCLUSION

To remedy the violation of petitioners' confrontation rights and to stop the increasing tendency of federal courts to ignore the confrontation rights of those citizens accused of engaging in conspiracies, the Court should grant the petition for a writ of certiorari filed by Thomas P. Vann and James E. Melhorn.

Respectfully submitted this 12th day of August, 1983.

Ephraim Margolin
Counsel of Record for the
National Association of
Criminal Defense Lawyers
240 Stockton Street, 3rd Floor
San Francisco, CA 94108
Telephone No. 415 421-4347